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No. 225.

Supreme Court of the United States.

October Term, 1917.

CITY OF COVINGTON,
Appellant,

versus

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellee.

Brief for Appellee.

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FRANK W. COTTLE,
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CITY OF COVINGTON,

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No. 225. *vs.*

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,

Appellee.

Brief for Appellee.

This is an appeal from a decree (R., 176) of the United States District Court for the Eastern District of Kentucky, in an action by the Railway Company against the City, finding that an ordinance of the City of Covington (R., 109) providing for the offering at public bidding of a franchise to operate a street railway on its streets, was an impairment of the franchises of appellee upon the same streets, and a cloud upon its title and enjoining the granting of a franchise under such ordinance.

Appellee was, and had been for many years, engaged in the operation of a street railway system in Covington. The City, claiming that its rights had expired, undertook by the ordinance complained of, to terminate its operation thereunder. The company, claiming that its rights

are still in full force and effect, and that the ordinance necessarily impaired them, and cast a cloud upon its title, brought suit in the District Court praying an injunction against granting any franchise thereunder.

The opinion of Judge Cochran, the District Judge, on plaintiff's motion for preliminary injunction and defendant's motion to dismiss the bill, is on page 164 of the record.

On the motion for preliminary injunction, the facts, including copies of the relevant acts, ordinances, contracts, etc., were before the court by affidavit.

After the preliminary injunction was allowed, the case was submitted for final decree upon the same evidence that was before the court on motion for preliminary injunction, with the addition of the deposition of W. H. Harton. See stipulation as to proof (R., 32).

The court did not give any further opinion but entered a decree (R., 176) in accordance with his opinion on the motion.

THE COMPANY'S GRANTS.

The principal charters, proceedings and grants under which the company claims, are set forth in their order for the convenience of the court in Appendix I to this brief, and may be considered under the following heads:

I. The Abbott Grant of December 23, 1869, and supplements, including the legislative grant of March 13, 1878.

II. The grant of June 8, 1882.

III. Subsequent ordinances extending or modifying the routes.

I. THE ABBOTT GRANT AND SUPPLEMENTS.

The company's rights date from and are largely based upon what is known as the Abbott grant, which is a contract with the City of Covington dated December 23, 1869 (App. 3; R., 64), and made under the authority of an ordinance of the City of Covington dated December 13, 1869 (App. 1-2; R., 60).

The ordinance grants to E. F. Abbott and associates "all the authority and right that the City of Covington has the capacity to grant" to construct, hold and operate a street railroad upon certain streets therein named. The ordinance proceeds:

> "Said grant is upon condition and in consideration of the strict and faithful performance by said grantees of all the terms, stipulations and covenants contained in a certain written agreement made by and between said city and grantees of even date herewith, and of record on the minutes of said council, and said grant shall determine upon failure of such performance." (App. 2; R., 60, 61.)

The agreement reads:

> "That in consideration of the terms, stipulations and covenants hereinafter made by the said party of the second part (Abbott) the said party of the first part (Covington) hereby agrees to grant unto the said party of the second part, all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott street from Fourth to Sixteenth," etc. (App. 3; R., 64.)

Less than a month later, on *January 21, 1870,* Abbott and associates became incorporated by special act of the General Assembly of Kentucky as The Covington & Cincinnati Street Railway Co., a corporation with *perpetual* succession, with power to construct, and manage railways in the City of Covington and vicinity (App. 11; R., 68). By the provisions of Section 5 of that act

> "The business of said corporation shall be the construction and operation of street railways in said city and vicinity along such streets and public highways of the city as the Council may grant the right of way to * * * and said city * * * hereby authorized to grant the right of way," etc.

By Sec. 5, it was given power to condemn a right of way, if unable to obtain it by agreement. By Section 6, the company was authorized to acquire such real and personal property, routes and railway tracks as might be deemed requisite for its use.

By ordinance of *December 28, 1874* (App. 13; R., 70), the time for the commencement of the work of constructing the street railway lines set forth in the contract of December 23, 1869, was extended six months from December 28, 1874,

> "upon the terms, conditions and stipulations contained in said contract as if the same were herein repeated. The said Abbott and his associates incurring all the liabilities and responsibilities therein provided and to enjoy all the rights and privileges therein granted."

One of the routes described in the original contract was modified by this ordinance.

By ordinance of *January 28, 1875* (App. 13; R., 76), Abbott and his associates were authorized, on the completion of the street railway on the Fourth and Main street route, to construct a line of street railway from Fourth street north through Market street and the alley immediately north thereof to the Suspension Bridge.

On *May 1, 1875,* Abbott and his associates made a formal deed to The Covington & Cincinnati Street Railway Co., of all their rights as aforesaid. (App. 14; R., 71.)

It appears from the affidavit of Mr. George M. Abbott (R., 30), who had personal knowledge and was personally concerned therein, that The Covington & Cincinnati Street Railway Co. built and commenced the operation of a street railway line over the streets mentioned in said ordinances, in the year 1875, at an expense of more than $48,000.

On June 24, 1875, while the road was in process of construction, the City recognized the company's ownership of the Abbott grant by a grant to it of a temporary connection track, the ordinance beginning:

> "That the Covington & Cincinnati Street Railway Company be and are hereby authorized to connect *their* track on Market street with *that on Fourth street,* by running west on the north side of Market Space to Scott street," etc. (App. 16; R., 75.)

On *January 25, 1876,* by special act of the General Assembly of Kentucky (App. 17; R., 72), E. F. Abbott and his associates, were incorporated under the name of The *South* Covington & Cincinnati Street Railway Co. (appellee) with "perpetual succession" and with "full power to * * * construct, operate and manage street railways in the City of Covington and vicinity."

Section 3 of said act is as follows:

> "The business of said corporation shall be the construction, operation and management of street railways in the City of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at any time, by agreement, purchase, lease, consolidate with, acquire hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport, or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof."

On *December 20, 1876,* The Covington & Cincinnati Street Railway Co. deeded all its property and franchises to The *South* Covington & Cincinnati Street Railway Co. (App. 23; R., 76.)

April 5, 1878, the charter of The South Covington & Cincinnati Street Railway Co. was amended, directly authorizing and empowering the company

> "To construct, extend and operate its line of railway along Fourth street from Scott street to the Newport and Covington Bridge over the Licking River and to cross the same on such terms as may be agreed upon by and between

said bridge company and this street railway company." (App. 21; R., 74.)

This was a direct legislative grant of a right of way on Fourth street.

On *October 13, 1881* (App. 25; R., 79), the City Council passed an ordinance which is as follows:

"WHEREAS, The South Covington & Cincinnati Street Railway Company has laid and is now using a single track railway in the alley running from Third street, north to the Covington & Cincinnati Bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public; therefore,

"BE IT ORDAINED BY THE CITY COUNCIL OF COVINGTON, That The South Covington & Cincinnati Street Railway Company, be, and the same is hereby, authorized to lay a double track on said proposed avenue, from Second street to Market space, so as to make connection with its tracks as now laid on Market space and Market street and to use and to enjoy the same, as well as its track on Fourth and Scott streets, *upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into by E. F. Abbott and the City of Covington, on the 23d day of December, 1869.*

"PROVIDED HOWEVER, That the said South Covington & Cincinnati Street Railway Company shall file with the city clerk its written acceptance of this ordinance within ten days after its passage."

This ordinance was duly accepted in writing (see Abbott affidavit (R., 30.)

In the year 1881, therefore, The South Covington & Cincinnati Street Railway Co. was the owner of the franchise on the streets of the City of Covington, embodied in the foregoing charters, ordinances and grants, and was engaged in the operation of a line of street railways on the streets therein named, and indicated in green on the plat filed with the affidavit of George M. Abbott (R., 32), and over the Suspension Bridge to and through the City of Cincinnati and return.

We claim, and the court below held, that the company's franchise as above set forth, was perpetual and within the power of the city to grant.

THE CITY HAD POWER TO MAKE A PERPETUAL GRANT.

Not only was the city authorized under the general statutes to make such a grant, but under the special charters referred to it was authorized to grant the right of way which, with the legislative authority given by the charters themselves, vested a perpetual franchise in the companies respectively.

ITS AUTHORITY UNDER THE GENERAL STATUTES.

By the *Consolidation Act of March 2, 1850* (Kentucky Acts 1849-1850, page 239, Wells Revision, page 104), the following powers were given to the City:

> "Sec. 2. * * * that all the streets, roads, lanes, alleys, commons, market spaces, public squares and grounds, and public landings, in said city, be and at the same time *are hereby vested in the city;* and where the owner of any land, within said corporation, shall lay out any

street, lane, alley, or any ground for public use, and so dedicate the same, it shall immediately vest in the city, and the authorities thereof shall have exclusive control over the same for the public use and good."

Section 19 is as follows:

"The council shall have the exclusive power to establish and *regulate* market spaces, wharves, docks, and to fix the rates of wharfage and other fees for the use thereof; and they shall also have exclusive power to establish and *regulate* the grades of all wharves and landings: all banks of the rivers Ohio and Licking, within the corporation limits, and all sidewalks, *streets, alleys,* lanes, spaces and commons of the city. They shall also have the *exclusive control of the streets,* sidewalks, lanes, alleys, market spaces and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair."

By the legislation above quoted the City of Covington held the *title* to its streets and public places and council had full power of *control* and *regulation* over them.

Under the express powers thus given to the City it had the power to grant a perpetual franchise.

On this subject Judge Cochran said (R., 166):

"By virtue of these provisions the defendant, at the time of the grant to Abbott and associates, was vested with an absolute title in its streets, was empowered to regulate them and had the exclusive control thereof. This title and right to regulate and control was sufficient in itself to empower defendant to grant to Abbott and associates a perpetual right to construct, operate, and maintain a street railway on its streets."

In *Owensboro* v. *The Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, page 67 *et seq.*, the court held that the City of Owensboro had power to grant a perpetual franchise under the 27th section of its charter giving to council the power to

> "regulate the streets, alleys and sidewalks and all improvements and repairs thereof."

The court reached this conclusion after a review of the Kentucky authorities.

This seems to us to foreclose the question of the power of the City of Covington to make the perpetual grant to Abbott.

Appellant's Authorities.

The earlier case, *Detroit Citizens Street Railway Co.* v. *Detroit Railways*, 171 U. S., 48, where it was said that franchises "given in perpetuity and in monopoly by a municipality must have for their authority explicit permission," etc., was a case which did not involve a perpetual franchise but an exclusive franchise, limited to 30 years from the date of its passage. The only question before the court, and therefore the only question which the court intended to decide, was whether the City of Detroit had the power to grant an exclusive franchise, and it was held that it had not.

In the Owensboro case this court held that while express power to grant an exclusive street franchise has generally been held essential, it was not essential to the granting of a perpetual franchise.

In fact we do not find a single case among those in which perpetual franchises were upheld, where a munic-

ipal corporation had express power given to it in so many words to make such a grant. The power was generally based on the municipal control of the streets.

Counsel for the City of Covington contends that this case should be distinguished from the Owensboro case, because here the only power is the "control" of the streets, whereas in the Owensboro case the city had the power to "regulate." Counsel is in error in point of fact, even if there were a distinction in law. The City of Covington had title to the streets and Council was given both power of control and regulation. (See Sections 2, 19, Consolidation Act March 2, 1850, *supra.*)

Counsel seeks also to draw some distinction between a telephone franchise, such as that involved in the Owensboro case, and a street railway franchise.

But the doctrine of the Owensboro case, that the power to "regulate" embraced the power to grant the perpetual franchise therein upheld, was not based on the peculiar character of a telephone franchise. The principal cases cited by the court in support of its holding are street railway and railway cases.

Detroit Citizens R. R. v. *Detroit*, 64 F., 628.
Atchison Street Railway v. *Mo., etc., Ry.*, 31 Kan., 661.
Brown v. *Duplessis*, 14 La. Ann., 842.
C. B. & Q. R. R. v. *Quincy*, 136 Ill., 489.
New Castle v. *Lake Erie, etc., R. R.*, 155 Ind., 18.

The leading cases cited by the court on the permanent character of the Owensboro franchise (230 U. S., on page 65) are *People* v. *O'Brien*, 111 N. Y., 1, and *Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U. S., 368, which are street railway cases.

In fact an examination of the authorities will show that the principles laid down in the Owensboro case had their origin in railroad and street railroad cases and that telephone companies and other public utilities were later held to come under the same rulings.

Counsel also says, "the very nature of the franchise involved in the instant case precludes the possibility of making another grant for similar use of the city streets occupied by appellee company's tracks." From this he argues that the franchise is, in effect, exclusive and therefore not within the power of the city.

While appellee is entitled to freedom from interference by other street railway lines on the particular portions of the streets where its tracks are laid, this is true of all street railway franchises and does not make them what are known in law as "exclusive" franchises. That expression means a franchise which is exclusive by its terms, irrespective of the physical situation.

An attempt was made by the appellee in the case of *Northern Ohio Traction Co.* v. *State, ex rel Pontius, infra,* to convert the franchise there involved, by the same process of reasoning, into an exclusive franchise for the purpose of making it invalid, but the court did not take that view. A street may be wide enough, or may be widened, so as to permit additional tracks, in which case they may be authorized without violating the rights of the first grantee.

Counsel for the City claims that it had no power, under the statutes above referred to, to grant any street railway franchise, perpetual or otherwise. This claim is based on certain language used by the Court of Appeals in *Louisville Railway* v. *City of Louisville,* 8 Bush, 415 (1871), and referred to in one or two subsequent decisions of the court. The court said (page 420):

> "Under the general legislative power of the municipal government to control and regulate the use of the streets of the city it could not grant to any person or corporation the right to lay down a railway in a street."

In that case the City Railway was in the streets under an ordinance authorized by special acts of the Legislature. Its franchise was not questioned. The only question in the case was whether the city might require it to remove its rails and substitute better rails in connection with the repaving of the street. The court found that the city might make such requirement by virtue of provisions in the special legislation authorizing the franchise, and, apparently for the purpose of confining the controversy solely to that special legislation, used the language above quoted, as to the general powers of the city.

The case can not be treated therefore as having the effect which counsel claims for it. It was cited on the same point by counsel in *Owensboro* v. *Cumberland Telegraph & Telephone Co.*, 174 F., 739, where the Circuit Court of Appeals, by Judge Lurton, said (page 751):

> "The case of *Louisville Railway* v. *City of Louisville*, 8 Bush. (Ky.), 415, is not in point. The only question in the case was whether the city might require a street railway company to remove its rails in order to allow the city to repave the street. The city railway was in the streets under an ordinance authorized by express legislative power. All that was said in reference to the insufficiency of a power to control and regulate, to support consent to occupation of streets by a street railway, was foreign to the case and not authoritative."

In *Covington Street Railway Co.* v. *City of Covington*, 9 Bush, 127 (1872), the court had under consideration the power of the City of Covington to exact a bonus from the Covington Street Railway Co. (not appellee or its predecessor). It did *not* hold that the City of Covington had no power to grant a street railway franchise except such power as it derived from the act of incorporation of the Covington Street Railway Co. It declined to pass upon that question and merely conceded (to the losing party) for purposes of argument that so far as the right to exact a bonus was concerned the City had no power except that contained in said act of incorporation, and then held that under said act of incorporation the City had such right.

Ruttle v. *Covington*, 10 Ky. Law Rep., 766 (1889), was a suit to enjoin the City of Covington from granting a right to construct steam railway tracks upon the streets.

The court held that under the general control which the city had over its streets, it could not grant the right to use the streets for a purpose

> "which would tend to obstruct and hinder the free use of the streets for the purposes and in the modes they are commonly understood to be dedicated for public and private use."

Obviously this principle would not apply to street railway tracks, for such use is a proper and well understood street use.

Even if this case involved the question raised by the City Solicitor, the decision was long after appellee's rights had vested. The Court of Appeals had held in *Wolfe* v. *Covington & Lexington Railroad*, 15 Ben Monroe, 404 (1854), before appellee's grant and after the Act of March 2, 1850, giving Covington ownership and

control of its streets, that the City of Covington had the power to grant a steam railroad the right to lay its tracks and operate its railroad along Washington street in the City of Covington. The details of the grant do not appear but it was presumably a permanent grant and so far as we can ascertain the City Council had no express authority other than the ownership and control of its streets above referred to. The court held that such a grant was for a proper street use.

Bateman v. *City of Covington,* 90 Ky., 390 (1890), held that the city, by virtue of its control of the wharf, had no power to lease a portion of it to a private individual to the exclusion of the public and for solely private use.

In none of these cases, therefore, was the question presented whether the city, by virtue of its ownership, control and power of regulation of its streets, had the right to grant a street railway franchise, and none of these cases can be properly said to have decided the question.

In *American Car & Foundry Co.* v. *Johnson County,* 147 Ky., 69, the Court of Appeals of Kentucky said (page 71):

> "The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city, as the municipality has control of the streets and public ways."

The general rule on the subject is stated in *Dillon on Municipal Corporations,* Section 575, where the author,

after stating that the usual powers of a general nature delegated to municipal corporations are not ordinarily sufficient to confer upon them the right to authorize the presence of steam railways upon the streets, says:

> "but it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or to refuse to permit the use of streets within their limits for such purposes."

This section of Dillon was cited with approval by the court in *Owensboro* v. *Cumberland Telegraph & Telephone Co.*, 130 U. S., on page 70.

Its Power Under the Legislative Charters of the Companies.

Even if there were ground for questioning the City's general power, it would be unimportant in view of the power expressly given by the special acts of the Legislature of Kentucky incorporating the Covington and Cincinnati Street Railway and its successor, The South Covington and Cincinnati Street Railway Company, the appellee.

The original grant to Abbott, Redgate and Blick, their associates, successors and assigns, was by contract dated December 23, 1869. Less than a month after this grant, January 21, 1870, Abbott, Redgate, Reid and Morton "and their associates" were incorporated under the special act above referred to (App. 10; R., 68) as the Covington and Cincinnati Street Railway Company, with *perpetual succession*, and with power to construct and operate street

railways in Covington along such streets as Council might grant the right of way to, and the City was authorized to grant the right of way. (Rec., 5.)

Subsequently, on December 28, 1874 (App. 13; R., 70), the time for the completion of the road was extended for a period of six months, and the route was modified.

As Abbott and his associates had been incorporated by special act of the Legislature for the purpose of building and operating a street railway in Covington, and as the special act empowered Covington to grant such corporation a right of way, the right of way theretofore given to them, and thereafter confirmed in them by the City in the extension ordinance of Dec. 28, 1874, is legally referable to the power given to the City by such special act.

Furthermore, on May 1, 1875, Abbott and his associates made a formal deed to the corporation, of all their rights as aforesaid (App. 14; R., 71), and in that year the corporation built and commenced the operation of the road. (R., 30.) While it was in process of construction, on June 24, 1875, the City recognized the corporation's ownership of the Abbott grant, by an ordinance permitting it to lay a temporary connection track, the ordinance beginning

> "That the Covington and Cincinnati Street Railway Company be and are hereby authorized to connect *their* track on Market Street, with *that on Fourth Street*, by running west on the north side of Market space to Scott Street," etc. (App. 16; R., 75.)

Thereafter on January 25, 1876, by special act of the Legislature of Kentucky, Abbott and associates were incorporated as the South Covington and Cincinnati Street

Railway, with "perpetual succession" and with "full power" to construct and operate street railways on such streets in said city as Council should grant the right of way to, and Council was authorized to grant the right of way. It was also authorized to acquire any other street railway in Covington. (App. 17; R., 72.)

On December 20, 1876, the Covington and Cincinnati Street Railway Co. deeded its road and property to the South Covington and Cincinnati Street Railway Co.

On April 5, 1878, the Legislature of Kentucky recognized the South Covington and Cincinnati Street Railway Company's ownership of the road by amendment to its charter, giving it a legislative grant to *extend* its line of railway along Fourth Street from Scott Street to the bridge over the Licking River (App. 21; R., 74), and on October 13, 1881, the City Council of Covington passed an ordinance (App. 25; R., 79) authorizing the company to double track the proposed Court Avenue and connect said tracks with its other tracks, and to use and enjoy the same "upon the same terms and conditions, as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into by E. F. Abbott and the City of Covington on the 23d day of December, 1869."

The City's recognition of the ownership by the two companies successively, of the Abbott grant, amounted to an express confirmation thereof in those companies and was backed by all the power which the City had, under the special acts of incorporation, to make original grants to those companies, which power, as we have seen, was complete and comprehensive.

The companies were given perpetual succession. The City's power, under the acts of incorporation, to grant

them rights of way was unlimited as to time and was as broad as the corporate purpose. (*Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 664.)

The power of condemnation, which in each charter was given to the corporation, on failure to obtain a right of way by agreement is further evidence of the perpetuity contemplated, because a right of way obtained by condemnation would of course be perpetual.

THE ABBOTT GRANT WAS AN EXPRESS GRANT OF A PERPETUAL FRANCHISE OR EASEMENT.

Where a municipal corporation owning and having the power to control and regulate its streets, grants a right-of-way thereon to a public utility without limiting its duration, such grant is a permanent grant, not by implication, but because that is a recognized method of giving a permanent grant.

In the case of *Owensboro* v. *Cumberland Telegraph & Telephone Co., supra,* the court said on pages 990-991:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant. *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S., 368, 395; 46 L. Ed., 592, 610; 22 Sup. Ct. Rep., 410; *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 661; 56 L. Ed., 934, 939; 32 Sup. Ct. Rep., 572; *People* v. *O'Brien*, 111 N. Y., 1,

42; 2 L. R. A., 255; 7 Am. St. Rep., 684; 18 N. E., 692; *People, ex rel Woodhaven Gaslight Co.,* v. *Deehan,* 153 N. Y., 528; 47 N. E., 787; *Mobile* v. *Louisville & N. R. Co.,* 84 Ala., 115; 5 Am. St. Rep., 342; 4 So., 106; *Arcata* v. *Arcata & M. River R. Co.,* 92 Cal., 639; 28 Pac., 676; *State, Hudson Telegraph Co., Prosecutor,* v. *Jersey City,* 49 N. J. L., 303; 60 Am. Rep., 619; 8 Atl., 123; *Dill. Mun. Corp.,* 5th Ed., Section 1265; *Nebraska Telegph. Co.* v. *Fremont,* 72 Neb., 25, 29; 99 N. W., 811; *Plattsmouth* v. *Nebraska Telegraph Co.,* 80 Neb., 460, 466; 14 L. R. A. (N.S.), 654; 127 Am. St. Rep., 779; 114 N. W., 588. If there be authority to make the grant, and it contains no limitation or qualification as to duration the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right can not be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien,* 111 N. Y., 1, 42; 2 L. R. A., 255; 7 Am. St. Rep., 684; 18 N. E., 692; a decision accepted and approved by this court in *Detroit* v. *Detroit Citizens' St. Ry. Co.,* 184 U. S., 368, 395; 46 L. Ed., 592, 610; 22 Sup. Ct. Rep., 410, 'The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties

as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.' *Dill Mun. Corp.*, 5th Ed., Section 1265."

See also to the same effect:

Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649.
Grand Trunk Western Ry. v. *South Bend*, 227 U. S., 544.
Old Colony Trust Co. v. *Omaha*, 230 U. S., 100.
Northern Ohio Light & Traction Co. v. *State of Ohio, ex rel Pontius*, — U. S., —, decided Jan. 28, 1918.

Our contention is supported by a recent decision of the Court of Appeals of Kentucky in the case of *City of Dayton et al* v. *South Covington & Cincinnati Street Railway Co.* (October, 1917), 177 Ky., 202.

The City of Dayton ordered the removal of certain tracks which had been laid in 1897 under a franchise originally granted by legislative charter and municipal consent in 1868, supplemented by municipal permission in 1897 for one of the two tracks. All of the grants were silent as to time. The court held they were not mere licenses, but property rights and were still in full force and effect, and enjoined the removal of the tracks. The court said:

"In this case the right to construct such turnouts as might be necessary for the operation of the street railway was conferred upon the original corporation, Newport & Dayton Street Railway Company, by its charter enacted in 1868. Under it the city of Dayton in the same year consented for a street railway company to be constructed upon its streets and it suffered and permitted it to be so constructed with the turnout heretofore mentioned. The increased traffic over the line necessitated the doubling of the track, which was done by the city's permission. All this occurred before the adoption of the present constitution requiring franchises upon public streets to be sold at public sale to the highest bidder. The right to the franchise then was acquired as soon as the street railway was constructed with the permission of the city. This right carried with it the privilege of constructing the turnout as well as acquiring and using the lot in question. After the doubling of the track the advancement of science necessitated the substitution of electric power for animal power, thus requiring the turnout originally consisting of a single track to be converted into a loop by the addition of another track to the turnout, and this second track was not the construction of a new turnout, but conforming the old one to modern conditions so as to meet the requirements and necessities of increased traffic and the substitution of electric for animal power. It was not therefore the granting of an additional franchise so as to convert the city's consent given in 1897 into a mere license, which it may revoke at pleasure. In short, we hold that under the facts disclosed by this record the plaintiff possesses a property right in and to the tracks constituting the loop in question and to the use of its lot in connection with the opera-

> tion of its railway, of which the city may not deprive it in the manner attempted."

The court in reaching its conclusion cited the following decisions of this court:

> *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649.
> *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S., 59.
> *Grand Trunk & Western Railroad Co.* v. *South Bend*, 227 U. S., 558.

Our present contention, therefore, is supported not only by the decisions of this court but by the decision of the Court of Appeals of Kentucky.

While it is sufficient that the ordinance grants a right without limitation as to time, there are other evidences in the ordinance and agreement showing affirmatively that it was the meaning and intent that the grant should be perpetual.

(*a*) Both the contract and the ordinance recite that the City grants to the company

> "all the right and authority that the said party of the first part has the capacity to grant."

Obviously this indicates the purpose of the City to make as complete a grant as it was capable of making, and, as we have seen, this is a perpetual grant.

Counsel for the City contends that this language was inserted to avoid conflict with a claim made by the *Covington* Street Railway Company (then operating a street railway on other streets in Covington) in its protest of May 13, 1869 (R., 56) that the City had no moral or legal right to make a grant to anyone other than itself on any streets.

This, we submit, is all surmise.

The claim in the protest of a wholesale legal monopoly was without foundation or merit (see charter, ordinance and contract App. 54, *et seq.*; R., 37, *et seq.*) and very slight emphasis was placed upon it in the protest. There is neither evidence nor reasonable ground to believe, that the City Council took it seriously or felt it necessary to avoid conflict with it by the use of any language for that purpose in the Abbott grant made more than seven months later. The protest appears in the record unexplained and unaccompanied by any evidence showing what action, if any, the City Council took with reference to it. For aught that appears in the record it may have been promptly overruled or withdrawn.

Furthermore we can not assume that the language in question was used for the suggested purpose, because it would not have been appropriate or effective to that end, if indeed any qualifying language in the grant would have avoided conflict with a claim that the City had no right to make any grant.

But whatever may have been the thought or circumstance which led the City Council to describe the grant as "all the right and authority that the party of the first part has the capacity to grant,"—whether or not it was inspired by some doubt as to the City's power—the language used is clear, it gives all that the City has the power to give, and leaves nothing for construction except the capacity or power of the City. When the extent of that power is ascertained the extent of the grant is determined. As we have seen, it was within the power of the City to make a perpetual grant.

(*b*) The ordinance recites that the grant is in consideration of the faithful performance of the conditions of the contract

"and said grant shall determine upon failure of such performance."

This indicates clearly the intention of the City that the company should hold its grant as long as it complied with its terms.

On this subject Judge Cochran said (R., 167):

"This brings us to the question whether it did in fact grant such a (perpetual) franchise to them. And as to this also there would seem to be no possible room for doubt. Both in the ordinance of December 13, 1869, and the contract of December 23, 1869, made pursuant thereto, it was provided that defendant granted to Abbott and associates 'all the authority and right' that it had 'the capacity to grant.' We have just seen that it had the capacity to grant to them a perpetual franchise. The provision then that there was granted all the authority and right that the city had the capacity to grant was the same as if it had said in so many words that it granted a perpetual franchise. The English language is not so poor that the same idea can not be expressed in different ways. Here, instead of saying that a perpetual franchise was granted it was said that all the authority and right which the city had the capacity to grant was granted, which meant exactly the same thing.

"Possibly the phraseology used indicates that defendant was not sure of the extent of its power and that the effect of the grant would be to pass a perpetual franchise. But it is clear that it intended that Abbott and associates should thereby acquire as enduring a franchise as it had the power to grant, and as it had power to grant a perpetual franchise it was within its intent that such a franchise should pass by the

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grant which it made. That the intent was to grant a perpetual franchise is enforced by another consideration. In the ordinance it was provided that the grant was made upon condition and in consideration of the strict and faithful performance by the grantees of all the terms, stipulations and covenants set forth in the contract, which it recited was of even date therewith and of record in the minutes of the council and that the grant should 'determine upon failure of such performance.' It appears from this provision that the only termination of the right granted, contemplated by the parties, was upon the happening of this condition subsequent."

THE RULE OF CONSTRUCTION.

Counsel for the City has cited the rule of construction that public grants in case of ambiguity are to be construed against rather than in favor of the grantee. But he does not point out any ambiguity in this case to call for the application of the rule.

He cites *Blair* v. *Chicago*, 201 U. S., 400. On page 472 the court says that the rule

> "requires such grants to be made in plain terms in order to convey private rights in respect of public property."

The court quoted with approval the decision in *Perine* v. *Chesapeake & Delaware Canal Co.*, 9 Howard, 172, 192, where the court said:

> "The rule of construction in cases of this description * * * is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public and the corporation can claim nothing that is not clearly

given by the law. We do not mean to say that the charter is to receive a strained or unusual construction contrary to the obvious intention of the grant. It must be fairly examined and considered and reasonably and justly expounded."

The court said on page 473:

"Grants of this character are not to be destroyed by an unreasonable or narrow interpretation."

In *Citizens Bank* v. *Parker,* 192 U. S., 73, the court states the limits of this rule in the following language on pages 85 and 86:

"The exemption of the charter includes a license tax. This, for the reason stated, must be regarded as part of the contract between the State and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we can not concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when

> all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute."

A franchise silent as to time is not ambiguous.

An examination of the cases in which perpetual franchises have been upheld by the courts will show that in all of them the franchises were silent as to time and that this absence of limitation has been held to indicate a permanent or perpetual grant. When we add the other considerations in this case, namely, the particular language of the Abbott grant, the perpetual rights given by the charters of the companies, and the power of condemnation, under which they could have obtained perpetual rights on failure to obtain them by agreement, there is no room left for the application of the rule of strict construction.

The Abbott Grant Was Not Limited by the Ordinance of 1864.

It is claimed by the City that the term of the Abbott grant (made in 1869) is limited to twenty-five years by the following provision of an ordinance of the City of Covington of December 15, 1864 (App. 64; R., 43), which is as follows:

> "All contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years."

That ordinance and the proceedings thereunder are set forth in their order in Appendix II of this brief.

The Abbott grant or contract of December 23, 1869,

was not made "under the provisions" of the ordinance of 1864. The Abbott grant contains no references whatever to that ordinance. That ordinance contains no reference to the Abbott grant. There is nothing in either document to indicate any connection with the other.

The Abbott grant was made "under the provisions" of the ordinance of *December 13, 1869* (App. 1; R., 60) which set forth in full the contract to be made thereunder, containing no such limitation.

It is claimed that the language above quoted from Section 13 became a term of all subsequent contracts because the ordinance of 1864 commenced as an ordinance general in form, although adopted for the purpose of letting a particular franchise.

We shall show later that this ordinance can not be treated as a general ordinance, but let us assume for a moment that it can be so treated.

Section 13 of the ordinance does not undertake to limit all subsequent contracts to twenty-five years, it simply says that

> "All contracts *made under the provisions of this ordinance* shall be for the term and period of twenty-five years."

What is meant by "all contracts made under the provisions of this ordinance?" This is answered by Section 8 of the ordinance which provides that any company or individual to whom the privilege should be granted should

> "within fifteen days after the award granting such privilege come forward and sign the proper contract, agreeing to abide by these stipulations," etc.

Section 13 of the ordinance therefore meant that any such contract as that provided by Section 8 should contain the limitation to a period of twenty-five years.

It can not be claimed that all contracts which the City of Covington made thereafter, were made under the terms of this ordinance. No contract could be construed as being made under the terms of that ordinance unless, in accordance with Section 8, it contained an agreement to abide by the stipulations of said ordinance, or incorporated such ordinance by reference.

This construction is illustrated by the first and only contract that was made under that ordinance, namely, the agreement of August 15, 1865, with The *Covington* Street Railway Co. (not appellee or its predecessor) (App. 68; R., 51). That agreement stated that the grant was made to the *Covington Street Ry. Co.*, "upon the terms and conditions contained in an ordinance of said City Council passed on the 15th day of December, 1864."

It also contained the following language, "This contract shall continue in force for a period of twenty-five years from its date." The City very clearly exhibited what it understood by "a contract made under the terms of the ordinance."

The general scheme in the passage of that ordinance is clear and simple; it set forth the terms upon which the City of Covington was then willing to grant a street railway franchise and provided in Section 8 the character of contract which the grantee was to execute, namely, a contract to be governed by the terms of that ordinance. All it contemplated was a contract designating the streets and referring expressly to the ordinance for the terms upon which those streets could be used. Only a contract of that character could be treated as a contract "under the provisions of" the ordinance.

The ordinance of 1864 did not limit the power of the City to make any contract thereafter under some subsequent ordinance. It could not operate like a statute or constitutional provision in that regard. Council was at liberty to make a contract the next day with the same or other parties, utterly ignoring the ordinance.

In the case of *Strassheim* v. *Jerman*, 56 Mo., 104, the court said on page 106:

> "The fact that a general ordinance (No. 5399) was in existence, providing a specific mode by which the approval of Common Council of all contracts was to be expressed, did not in any way tend to prevent the adoption of a different method, by subsequent ordinance, for giving like expression to legislative approval; for, as a matter of course, the same power which ordained the enactment of the one ordinance still existed when the second was approved."

It is not a Question of Implied Repeal.

The ordinance of 1864 did not purport to regulate all future grants, it merely provided for the insertion of a 25 year limitation in any contracts made under *its* terms.

It was not necessary for the Council of Covington to repeal this ordinance, as suggested by the City Solicitor, by implication or otherwise, when it came to make the Abbott grant in 1869 under a new and different ordinance, setting forth in detail the form of contract to be signed by the parties.

The Ordinance of 1864 is not General.

It is idle, however, to treat that ordinance as being general. While its opening language, standing alone,

might suggest that it was to be general in character, the subsequent clauses and the surrounding circumstances show that it was a particular ordinance for a particular purpose.

It appears from the Council proceedings (App. 58; R., 39 *et seq*) that on November 10, 1864, the incorporators of the *Covington* Street Railroad filed their charter and statement of route and asked for a franchise. The Special Committee to which this application was referred, reported in favor of granting it in substance and Council concurred in the report and instructed the Committee on Law and the City Attorney "to report an ordinance granting the street railway company the franchise asked for in their petition agreeable to the report of the committee."

On December 15, 1864, this committee in response to the instruction just stated, reported the ordinance which we have under consideration. In other words, while the ordinance starts out with certain general language, it was an ordinance prepared under instructions for the purpose of granting to the *Covington* Street Railway Co. the franchise asked for in the petition referred to.

Section 11 of the ordinance instructed the clerk to advertise the ordinance. The advertisement in the Daily Times of January 4, 1865, and signed by the City Clerk of Covington is as follows (App. 65; R., 36):

> "The Legislature of Kentucky having incorporated the Covington Street Railway Company, the City Council of Covington, Ky., on the 15th day of December, 1864, passed an ordinance prescribing the terms upon which the City will grant the right of way and upon what streets the road may run, and offered the franchise to any responsible company who will pay into the City Treasury of Covington the largest bonus for

the same, and to the incorporators, any expense they may have incurred in making a survey of the routes above referred to together with the maps and estimates not exceeding $100.

"Sealed proposals will be received at the City Clerk's office up to February 1st, 1865. The ordinance above mentioned can be had at this office."

This ordinance was passed so that the particular franchise desired by The Covington Street Railway Co. could be offered for public bidding. The Covington Street Railway Co. is itself named in the ordinance and advertisement.

Only one grant is provided for, the routes are specified, the date of the advertisement and the papers in which it was to be made were specified and sealed proposals were to be received "up to the first of *February next* for the franchise *above named.*"

It was provided in Section 12 that the company to whom "this franchise is granted" may have the privilege of repairing the streets between the rails by bouldering, etc.

Not only were the special routes prescribed but it was provided that 2½ miles of road should be put in operation within twenty-four months after signing the necessary contract. Obviously this could refer only to the one franchise, because any subsequent franchise might cover a half mile or ten miles.

It was also stated that the incorporators of The *Covington* Street Railway Co. proposed to transfer their charter to the successful bidder and that in such case the bidder should pay the expense incurred by the incorporators in making the survey.

The ordinance is special in its character and was merely the basis for a contract then in contemplation between the parties.

This is further evidenced by the fact that after the bid on behalf of The *Covington* Street Railway Co. incorporators had been accepted an ordinance was passed under date of August 2, 1865, providing that at the end of the *Covington* Street Railway Co's. grant the same routes should again be offered, on the condition that the successful bidder should buy the equipment of the *Covington* Company. This ordinance of August 2, 1865, relates wholly to The *Covington* Street Railway Co., yet it is adopted and described in its own terms as an amendment to the ordinance of December 15th.

On page 20 of his brief, counsel claims that Section 8 of the ordinance of 1864, as originally reported, provided that the individual or company to whom the franchise should be granted, should sign a contract within 15 days "after the *passage of the ordinance*" but that Council amended this section so as to provide that the contract should be signed within 15 days after the *award*. He claims that this change indicated an intention to make the ordinance general in its operation. But there is an entirely different reason for the change.

Section 11 provided that the advertisement should continue and that bids should be received up to February 1, about six weeks from the time of the passage of the ordinance. Obviously the successful bidder could not be expected to sign a contract within two weeks after the passage of the ordinance. The time limit for the signing of the contract would, in any event, naturally date from the award, because after the bids were received an indefinite time might be taken by Council before making the award.

The impossibility of treating this ordinance as a general ordinance and applying it to the Abbott grant will appear if an attempt be made to give it a practical application as a general ordinance. Let us endeavor to apply it to the Abbott grant.

Section 3 provides that all tracks shall be of the gauge of 5 feet 2 inches, of the most approved rail, etc. Apply this to the Abbott grant and we find that the latter contains its own stipulations as to the gauge and makes its own provisions as to the rails.

Section 3 further provides for a $50,000 bond. No provision for a bond is made in the Abbott grant and none was required by the City or given by the parties. This is the strongest possible indication that the City of Covington did not regard the Abbott grant as being made under the provisions of the ordinance of 1864.

Section 4 of the 1864 ordinance provides that the grantee shall use

> "good cars with all modern improvements and should run cars as often as the public convenience may require."

The Abbott grant makes its independent provisions on these subjects in Section 8, providing that the cars should be "of the best style and class in use," etc.

Section 5 provides for a five cent fare. The Abbott grant makes its own provision as to fares in Section 8.

Section 6 provides that the franchise granted thereunder should not be assignable without the consent of the City Council. The Abbott grant is made expressly to Abbott, Redgate and Blick "their associates, successors and assigns."

Section 7 of the ordinance provides for the liabilities of the City of Covington and the company in case of any

of the occurrences therein stated. This subject is independently covered in the Abbott grant by Section 9.

Section 8 of the 1864 ordinance provides for the particular sort of contract to be signed. In the Abbott grant council made its own contract.

Section 9 of the 1864 ordinance contains a number of regulations as to the operation of cars. The Abbott grant contains its own regulations covering the same subjects and in a different way.

Section 10 of the ordinance of 1864 specifies the route and provides for public bidding. The Abbott grant specifies a different route and authorizes the contract without any public bidding.

Section 11 of the 1864 ordinance provides for advertisement, before the contract is made. In the Abbott ordinance council made its contract without any advertising.

Section 12 of the ordinance provides for bouldering between the rails, at the option of the grantee. The Abbott grant, Section 6, requires the street between the rails to be paved with the same material as that outside the rails.

Section 13 of the ordinance of 1864 provided a twenty-five year limitation for contracts made thereunder. The Abbott ordinance incorporated its own form of contract, without any such limitation, and granted "all the right and authority that the City of Covington has the capacity to grant" which was to be determined upon failure of performance by the grantee of its duties thereunder.

By Section 8 of the 1864 ordinance the road was to be completed within twenty-four months. By the first section of the Abbott grant the road was to be completed within periods of nine months and a year.

In the 1864 ordinance there was a bonus of so much per year to be paid by the grantee and the ordinary vehicle tax in addition, not higher than 10c. per car. In the Abbott grant there was no bonus provided, but a specific $25 license fee as to each car.

Suppose the appellee claimed by virtue of the ordinance of 1864 some right in addition to that which it obtained in the Abbott grant, on the theory that the Abbott grant was made under the terms and conditions of the ordinance of 1864. Could it be heard to make such claim, when the Abbott grant contained no reference to that ordinance, contained numerous inconsistent provisions and was not accompanied by the bond for $50,000 prescribed in that ordinance? Certainly not, and for the same reasons it can not be held to be limited in its rights by the terms of that ordinance.

This question was involved in an action brought by the City of Covington against the South Covington & Cincinnati Street Railway in the Kenton Circuit Court in 1910, to recover certain annual payments which the city claimed to be due in and after 1892 under an ordinance of July 7, 1887 (R., 84). The company claimed that such payments were discharged and released by a clause in Section 9 of the compromise ordinance of October 17, 1892 (App. 46), which stipulated certain annual payments "in lieu of any and all car licenses or *bonus.*" The company claimed that the payments provided in the ordinance of July 7, 1887, were the "bonus" referred to. The city claimed that the word "bonus" referred to the payments provided by the ordinance of December 15, 1864. The court rejected the city's argument and held in favor of the company, saying:

> "The ordinance of 1864 starts out in form as a general ordinance, but its subsequent provi-

> sions are applicable only to the grant over certain streets named and then platted and filed in the office, which was in contemplation at the time of the enactment, and no subsequent grant of any franchise to the three railway companies or to Abbott was made according to its provisions or upon its terms, but all upon ordinances and contracts contrary to it, and none of its provisions were applicable to the subsequent grants or the contract of 1892."

The Kenton Circuit Court was affirmed by the Court of Appeals, 147 Ky., 326, the court saying (p. 331):

> "The franchise granted under the ordinance of December 15, 1864, expired in 25 years, or on February 2, 1890, two years before the contract of October 7, 1892, was made; so it is evident that the bonus provided for under that franchise could not have been referred to."

This language, taken with the opening language of the court's opinion, shows clearly that the court regarded the contract of the Covington Street Railway Co. of August 15, 1865, as the only franchise which was granted under or related to the ordinance of December 15, 1864.

On this subject Judge Cochran said in his opinion (R., 169-171):

> "Seemingly the ordinance was in part of the character (general) claimed by the defendant. And for the sake of the argument it will be assumed that such was the case as to such part. Such, however, is not a complete description thereof. The 10th section ordained that the franchise for street railroads provided for according to the plan of the roads as laid down in the schedule of the Covington Street Railroad Company be granted to any responsible company which would pay to the city the largest

bonus for the same and to the incorporators of that company any expense they had incurred in making the survey of the routes together with maps and estimates not to exceed $100.00. The 11th section provided for the making of a certain advertisement that sealed proposals would be received until February 1st, 1865, for the franchise and that it would be awarded to the highest and best bidder at the first meeting of council thereafter. It concluded with this recital.

" 'It being understood that the present incorporators propose to transfer their rights and privileges in and to the charter obtained by them for a street railroad in this city, to the company or individual offering the largest bonus for the above mentioned franchise.'

"These provisions contemplated, that in any contingency, the franchise which was thus to be offered for sale and awarded to the highest and best bidder would go to the Covington Street Railway Company. It would go there either by that company becoming such bidder or by such bidder acquiring the right to such company and transferring his bid to it. By the 13th section of the ordinance it was provided that all contracts made under its provisions should be for the term and period of twenty-five years.

* * * * * *

"Now it is the contention of defendant that because this ordinance of December 15, 1864, whereby it was provided that all contracts made thereunder should be for the term and period of twenty-five years, was, at the time of the making of the grant to Abbott and associates, unrepealed, that grant was for a definite period of time and that twenty-five years from the date when it was made. It would seem not to require much argument to demonstrate the unsoundness of this contention. The mere statement of it

may be said to condemn it. Taking the ordinance to be, as it is claimed to have been, *i. e.*, as intended to limit subsequent grants of street railway franchises it must be conceded that the council of 1864 had no power to limit the action of the Council of 1869 and later years and that in determining the extent of the grant made by the latter council it is its intent and not that of the former council which controls. There is not a word in the ordinance of December 13, 1869, or the contract of December 23, 1869, made pursuant thereto referring to the ordinance of December 15, 1864, or which indicates that it was the intention that the grant to Abbott and associates should be affected to any extent by it. On the other hand that ordinance and contract are comprehensive in character and cover substantially all the details that one would expect to find covered in a grant of a street railway franchise. They cover substantially all the details covered making the same provisions and in others a different one. And over and beyond all this, whereas the ordinance of December 15, 1864, provided that all contracts made under it should be for twenty-five years, that of December 13, 1869, and the contract made pursuant to it, provided that the grantees should have all the authority and right which the defendant had capacity to grant, which was a right in perpetuity, and the only termination of that right called for was in the happening of the condition subsequent provided for."

THE TWO ORDINANCES ARE NOT IN PARI MATERIA.

This is not a case for the application of the doctrine that statutes or ordinances in *pari.materia* are to be read together.

In *People* v. *Aichinson*, 7 How Pr., 241, 245, it was said:

> "The word par must not be confounded with simile. It is used in opposition to it * * * intimating not likeness merely, but identity."

Private grants to two different grantees are not in *pari materia*; neither is an ordinance providing a specific method of making a grant and prescribing the terms of the contract therefor in *pari materia* with a subsequent ordinance making another private grant to a different person and setting forth in full the contract to be signed by the parties.

In *Fullinwider* v. *Southern Pacific R. Co. of California et al*, 229 F., 717, the Circuit Court of Appeals for the 9th Circuit said:

> "Those various railroad grants were not in *pari materia*. They did not relate to the same persons or things, or to the same class of persons or things. Each grant was distinct in itself, and each grant was distinct from the others. The grantee of one of those grants, in order to ascertain the nature of the rights and privileges conferred upon it, was not bound to refer to any other grant or act of Congress. Again, the rule of *pari materia* is a rule of construction only, and is resorted to for its assistance in determining the meaning of a doubtful statute. It has no application where the language of the statute is, as in the present instance, clear and unambiguous."

In *Hamilton* v. *Rathbone*, 175 U. S., 414, the court stated the iimitations upon the rule even as applied to general statutes.

> "The general rule is perfectly well settled that, where a statute is of doubtful meaning and

susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. * * * The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation."

II. THE GRANT OF JUNE 8, 1882.

It will be seen from the map (R., 32) that in the year 1882 The South Covington & Cincinnati Street Railway Co. was operating lines on Scott street and on what may be termed the Pike and Main Street Route.

The Covington Street Railway Co. was operating a line on Madison avenue, the only line which it had constructed under the contract of 1865, or at all.

The companies were operating independently and did not use any tracks or streets in common.

The access of The South Covington & Cincinnati Street Railway Co. to the Suspension Bridge was over Court Avenue by a perpetual franchise, like the remainder of its grants.

The Covington Street Railway Co. obtained access to the Bridge over Greenup and Second Streets and Scott

and Second Streets, a comparatively roundabout way.

In this state of affairs the City of Covington made a grant to the South Covington & Cincinnati Street Railway Co. of a right of way over all the streets named in the contract of The Covington Street Railway Co. (App. 69; R., 51-2), including those upon which that company had built and those upon which they had not built, the latter being the greater length.

The report of the Committee and the ordinance, with its title, are as follows (App. 27; R., 80):

> "To the Honorable President and Members of the City Council:
>
> "Gents— Your Com'tee. on Railroads and Bridges to whom the within communication was referred, would most respectfully report in favor of the passage of the accompanying ordinance, which provides for Court Avenue and Park Place, to be free from St. Railroad tracks.
>
> "ALEX DAVEZAC,
> "T. J. SMITH."

> "Report of Com'tee concurred in, and the accompanying ordinance, having been duly read, was passed, to-wit:
>
> "*An Ordinance granting the right-of-way over certain Sts. in the City of Covington, to the South Covington and Cincinnati St. Railway Co.*
>
> "Section 1. Be it ordained by the City Council of the City of Covington, that the South Covington and Cincinnati St. Railway Co. be and the same is, hereby authorized to contract with the Covington St. Railway Co. for the right-of-way over and along, the streets specified in the contract between the said Covington St. Railway Co. and the City of Covington, dated August 15th, 1865, and, the consent of the later com-

pany having been obtained, *the said South Covington and Cincinnati St. Railway Co. is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations, and restrictions contained in the ordinances, regulating its rights to the streets now occupied by said South Covington and Cincinnati Street Railway Co.* Provided however, and the rights hereby granted are upon this condition, that the said South Covington and Cincinnati Street Railway Co. shall within 30 days after the passage of this ordinance, remove its track on Court avenue and Park Place, and relinquish all rights, and claim to the same; but in the event the City authorities shall hereafter authorize any other street railway company or companies to occupy and use, said avenue, or Park Place, for street railway purposes, then, the said South Covington and Cincinnati Street Railway Co. shall have the same right to use, said avenue and Park Place, that it now possesses under existing ordinances; and provided, also, that said company shall have the right to make such curves and connections as may be necessary, to connect its track, with the tracks, on Greenup and Scott streets.

"Section 2. This ordinance shall take effect from and after its passage, provided that the said South Covington and Cincinnati Street Railway Co. shall within ten days from the date hereof, file their written acceptance of the same with the City Clerk."

This ordinance was accepted by the company and it relinquished its rights on Court avenue and changed its route to the bridge as provided in said ordinance and proceeded to construct its tracks and operate its lines

over the greater portion of the streets named in the contract of the Covington Street Railway Co.

Before considering the legal effect of these proceedings in detail, let us recur for a moment to the position of the parties.

The South Covington & Cincinnati Street Railway Co. was operating under a legislative charter, which created it a corporation with *perpetual succession* and with full power to construct, operate and maintain street railways in the City of Covington and vicinity, "along such streets and public highways in the City as Council shall grant the *right-of-way to.*" It thus had the perpetual power to carry on the street railway business in the City of Covington and it had a perpetual franchise over all the lines which it then operated in the City of Covington, including, its line over Court avenue by which it gained access to the Suspenson Bridge.

It had a direct legislative grant, unlimited as to time, over Fourth street in Covington, by amendment to its charter April 5, 1878 (App. 21; R., 74).

It had the power to operate on the same terms over any other streets in the City of Covington on which the City of Covington should grant it "the right-of-way." (App 18; R., 72.)

It is unnecessary to consider whether a right-of-way thus obtained was a municipal grant or a mere municipal consent to a legislative grant. The point is that the function to be performed by the City of Covington under the charter of this company was to grant a "right-of-way."

Let us consider the proceedings of Council in the light of these facts.

The ordinance which was passed was entitled—

> "An ordinance granting the *right-of-way* over certain streets in the City of Covington, to the

> South Covington & Cincinnati Street Railway Co."

This title meets exactly the requirements of the charter of The South Covington & Cincinnati Street Railway Co., under which that company was required to obtain from the City the right-of-way over streets.

Section 1 of the ordinance states that The South Covington & Cincinnati Street Railway Co. is authorized to contract with The Covington Street Railway Co. for the right-of-way over and along the streets specified in the contract of August 15, 1865,

> "and the consent of the latter company having been obtained, the said South Covington and Cincinnati Street Railway Co. *is hereby authorized* to occupy and use the streets specified in said contract for street railway purposes."

Even if the ordinance had stopped here the company would be entitled to claim the perpetual right-of-way under the decisions of the court, especially under the decision in *Boise Co.* v. *Boise City*, 230 U. S., 84, 90, where the grant was simply of the right to "lay and repair" waterpipes.

But this conclusion is made certain by the language which follows:

> "subject to the conditions, limitations and restrictions, contained in the ordinances regulating *its* rights to the streets now occupied by said South Covington & Cincinnati Street Railway Co."

The pronoun "its" naturally refers back to the preceding proper noun "The South Covington & Cincinnati Street Railway Co."—this as a matter of English con-

struction. This is made doubly sure by the repetition which immediately follows of the name of The South Covington & Cincinnati Street Railway Co.

If it had been intended to limit the South Covington Company's rights to the period set forth in the contract of August 15th, 1865, which had just been referred to, the contract would naturally have read "subject to the conditions, limitations and restrictions contained in said contract." Or, if it had been intended to subject the South Covington grant to the terms of the ordinance of 1864, that ordinance would naturally have been referred to.

Counsel attaches some significance to the plural form of the word "ordinances" as indicating that the ordinance of 1865 (which did not "regulate its rights") must be included to make the plural. But this position is not tenable. At the time of the ordinance of 1882 the pre-existing rights of the South Covington Co. were based on at least four ordinances of its own, to which we have heretofore referred. There is no adverse significance, therefore, in the plural of the word "ordinances."

The indication is clear, we think, from the ordinance itself that the South Covington Company obtained under this ordinance of 1882, its own independent grant to the streets named in the contract of August 15, 1865.

It had by its legislative charter, the perpetual right to do business in the City of Covington; it had by amendment to its charter a perpetual right on Fourth street from Scott street to the Licking river; it had from the City of Covington a grant of a perpetual right-of-way for all the lines which it was then operating.

The title of the ordinance and the ordinance itself show that a direct grant of a right-of-way was intended and the body of the ordinance subjects it to the limitations and restrictions applying to the other grants of the South Covington and Cincinnati Street Railway Company in the City of Covington.

As this court said in the case of *Louisville* v. *Cumberland Telephone Co.*, *supra*, on page 664:

> "It was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets."

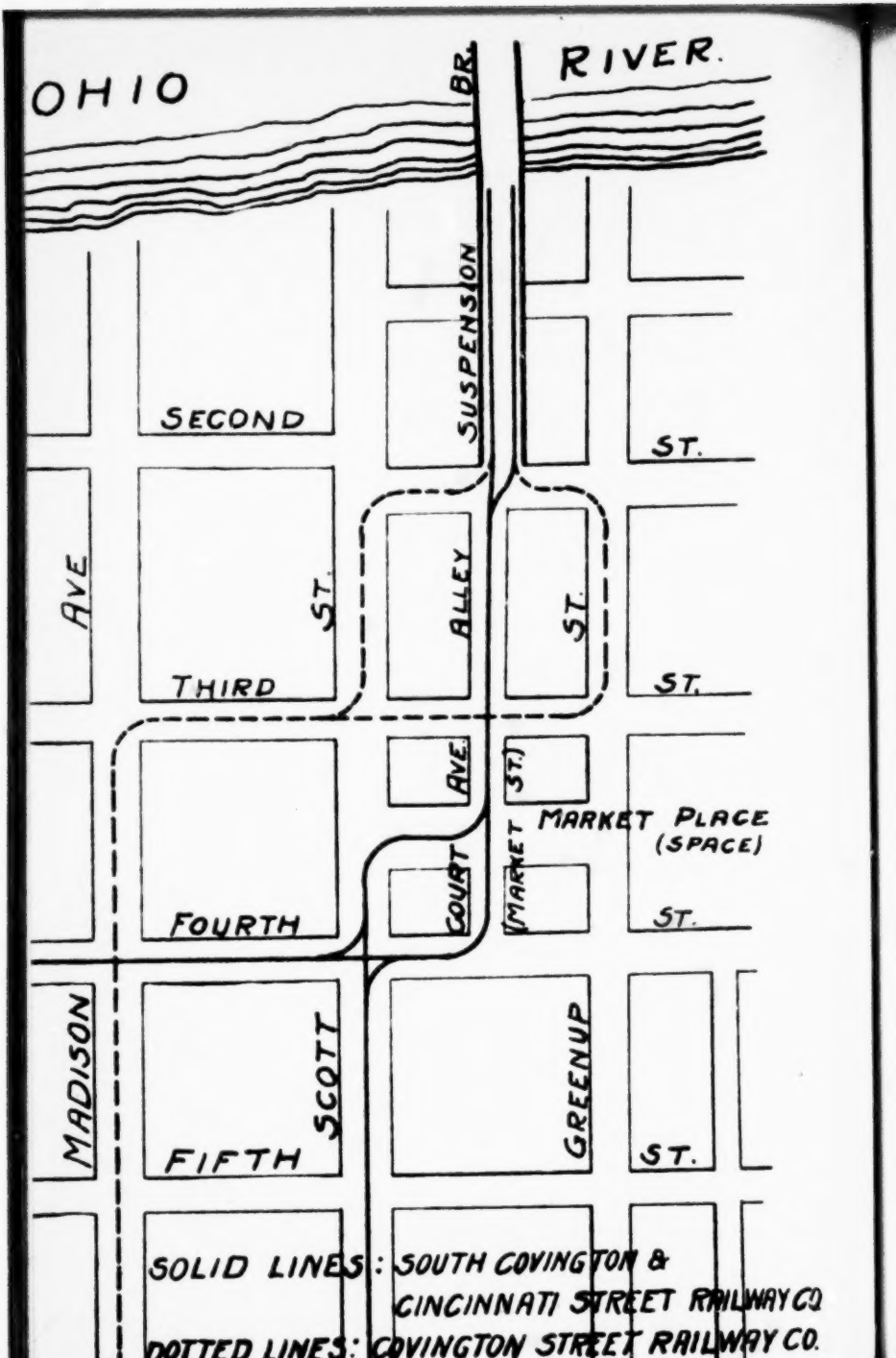
See, also, *Blair* v. *Chicago*, 201 U. S., 400, 482, where the court says:

> "the right granted must be construed with reference to the system of which it was made a part," etc.

This construction is borne out by the relations of the three parties. The South Covington & Cincinnati Street Railway Co. had the right under its charter, Section 4, to make a contract with the Covington Company for a right-of-way over its tracks without the consent of the city.

The city did not wish to make a grant to the South Covington & Cincinnati Street Railway Co. over the streets occupied by the Covington Company without the consent of the latter, which claimed an exclusive right on those streets under its charter, Sec. 6. (App. 57; R., 38.)

This transaction, therefore, is to be treated as a grant by the city and consent by the Covington Company, not as a grant by the Covington Company and consent by the


OHIO
RIVER.
BR.
SUSPENSION
SECOND
ST.
AVE
ST.
ALLEY
ST.
THIRD
ST.
AVE.
ST.
MARKET PLACE
(SPACE)
COURT
MARKET
FOURTH
ST.
MADISON
SCOTT
GREENUP
FIFTH
ST.
SOLID LINES: SOUTH COVINGTON &
CINCINNATI STREET RAILWAY CO.
DOTTED LINES: COVINGTON STREET RAILWAY CO.
SIXTH
ST.

city. If regarded in the latter aspect it would have been wholly unnecessary.

The consideration for the grant was the relinquishment of the perpetual right-of-way and the removal of the tracks on Court avenue.

The report of the council committee recommended "the passage of the accompanying ordinance which provides for Court avenue and Park Place to be free from street railroad tracks." (App. 27; R., 80.)

It can not be reasonably supposed that the company would relinquish such a valuable and important right-of-way and its only access to the Suspension Bridge and to Cincinnati for another less direct access to the Suspension Bridge having only eight years to run. (See map on opposite page.) Nor is it to be supposed that the company would accept a grant for only eight years over the streets in the City of Covington not then occupied by the Covington Street Railway Co., although named in its contract, and incur the expense (more than $150,000; see Abbott affidavit R., 31) of building its tracks thereon and increasing its equipment and expenses, for such a short period.

Counsel says on page 40 of his brief, that the dispute as to the duration of appellee's franchise is one of long standing and "dates back to the time it acquired the rights and franchises of the Covington Street Railway Co., certainly to the time it was authorized by ordinance approved August 5, 1889, to use electric power to propel its cars."

The earliest mention of any controversy as to the duration of appellee's franchise is in the ordinance of August 5, 1889, which was seven years after the grant of 1882, and the expenditure of $150,000 made thereunder.

Upon this subject Judge Cochran said (R., 173-174; 174-175):

> "Now it is defendant's contention that the sole thing which plaintiff acquired by this ordinance (June 8, 1882) was authority to purchase the unexpired franchise of the Covington Street Railway Company. But this position is not tenable. Several considerations are against it. If such was the sole purport of the ordinance why were not its terms confined to granting such authority? They were not so confined. It further authorized plaintiff, having obtained the consent of the Covington Street Railway Company, to occupy and use the streets specified in its contract. It provided that its occupation and use thereof should be subject not to the conditions, limitations and restrictions contained in that contract and the ordinance of December 15, 1864, pursuant to which it was made, but to those contained in the ordinances regulating 'its,' *i. e.*, plaintiff's right, to the streets then occupied by it. And it provided further that the rights thereby granted were granted upon condition that plaintiff should within thirty days after the passage of the ordinance remove its track on the connecting line with the Suspension Bridge and relinquish all right and claim thereto, which would leave to it as the only means of access thereto the roundabout way in which the Street Railway Company reached the Bridge. As heretofore held it had a perpetual franchise over this connecting line. It is inconceivable that plaintiff would have been willing or the defendant would have expected it to relinquish this valuable right in consideration of the right to purchase and use the Covington Street Railway Company's unexpired eight years franchise, so that on the expiration thereof it would have been without access to the bridge by the original line to which

it had a perpetual franchise as heretofore held. Particularly is this so when in fact it had the right to purchase that Company's unexpired franchise without the defendant's consent, the giving of authority to purchase being accounted for by the desire to remove any question as to its right and by the fact that the making of the purchase was made a condition of the making of the grant. But the title of the ordinance is conclusively against this contention. It makes no reference whatever to the matter of authority to make the purchase. The subject matter of the ordinance according thereto is a grant of a right of way over certain streets in the City of Covington to the plaintiff. It must be held, therefore, that this ordinance made an independent grant to the plaintiff of a right of way over the streets covered by the contract with the Covington Street Railway Company.

"It remains to determine the duration of this grant. Nothing is said expressly on this subject. According to the title of the ordinance the grant is of a right of way and according to its body it is of a right to use and occupy, without anything being said as to the duration of the right of way or the right to use and occupy. Nothing else appearing, this presents a case for the application in full force of the doctrine of the Morristown, Frankfort and Owensboro cases and according to it the grant is of a right in perpetuity."

* * * * * * * * *

"Besides plaintiff had perpetual succession and as heretofore held, it then had a perpetual franchise over certain streets of defendant, mainly under a grant from it, but including a grant as to a small portion thereof from the Legislature of Kentucky direct. The object intended to be accomplished was to get rid of

two independent lines and consolidate them in one line and system which object would be subject to frustration if thereby a perpetual franchise was not granted. I am, therefore, clearly of the opinion that under this ordinance as well as under the Abbott ordinances plaintiff acquired a perpetual franchise."

The ordinance of June 8th, 1882, was accepted in writing by the South Covington & Cincinnati Street Railway Co. (R., 31); the consent called for by the ordinance was given by the Covington Street Railway Co. Some time in the month of June 1882 the South Covington Company removed its tracks on Court Avenue and Park Place and commenced the use, in lieu thereof, of Greenup from Fourth to Second; Second from Greenup to Scott; Scott Street from Second to Fourth, and gave up its direct access to the Suspension Bridge and Cincinnati over Court Avenue and accepted in lieu thereof the access to the Suspension Bridge by way of Greenup, Second and Scott Streets as aforesaid; it also built its tracks and operated its cars over the greater portion of the streets covered by said ordinance of June 8, 1882, expending on account of construction a sum in excess of $150,000. (R., 30-31.)

Nine months later, namely March 20, 1883 (R., 81), the entire property of the Covington Street Railway Co. was offered for sale at a foreclosure sale and was bought by the South Covington Company. This sale covered principally the tracks, cars, equipment and real estate of the Covington Company. It included incidentally whatever franchise the Covington Street Railway Co. then owned because they were included in the offer for sale. However no claim of any franchise rights is made in this

case, or ever was made by plaintiff under said Master Commissioner's deed.

Numerous references are made in brief of counsel to the acquisition by appellee of the Covington Street Railway franchise, or the "Sherlock grant," as if the rights claimed by appellee under the ordinance of 1882 involved merely the unexpired term (eight years) of that grant.

For the reasons just stated these references and the implication contained therein are misleading and erroneous.

III. SUBSEQUENT ORDINANCES EXTENDING OR MODIFYING THE ROUTES.

These ordinances are mere extensions or modifications of the routes of the plaintiff upon the same terms as the existing routes, and do not affect, or purport to affect the duration of the grants.

1. Ordinance of August 28, 1884 (R., 82-84), authorizing the company to extend its double track on Madison Street from Twelfth Street south to the southern terminus of the route or the corporation line (at about Twentieth Street).

2. Ordinance of July 7, 1887 (R., 84-86), authorizing what was known as the Austinburg extension on Powell, Rickey, Oliver, Edward, Seventeenth and Scott Streets.

This ordinance substituted an annual payment to the city of $2,600 in lieu of all obligations for street repairs on the entire system.

3. Ordinance of August 5, 1889 (R., 86-88), authorizing the substitution of electric power and cars for horse power and cars. The substitution was made promptly by the company (R., 32).

4. Ordinance of January 3d, 1891 (R., 93), granting the company the right to lay and maintain tracks for street railway purposes to connect its Madison Avenue tracks with the car barn on the corner of State Street and Madison Avenue.

5. The Compromise Ordinance of 1892. (App. 34; R., 96.) This ordinance requires some preliminary explanation. In or about September, 1890, the City Council of Covington resolved that the rights of the South Covington & Cincinnati Street Railway Co. under the ordinance of June 8, 1882, had expired and authorized proceedings to offer for sale a new street railway franchise over those streets (R., 88-90).

The South Covington Company and the trustee of its bonds, immediately brought separate suits in the United States Circuit Court for the District of Kentucky to enjoin further proceedings, on the ground that the franchise of the South Covington Company had not expired.

This situation resulted, after extensive negotiations, in the compromise ordinance of October 7, 1892 (App. 34; R., 96). The ordinance speaks for itself; it provided in substance as follows:

(a) That the controversy between the City and the Company over the duration of the franchise should, by agreement, be postponed for a period of twenty (20) years from the date of the acceptance of the ordinance and that in the meantime the City would make no attempt to offer for sale any of the franchises then held or enjoyed by the Street Railway Company.

(b) A reduction of fares in Covington and between Covington and Cincinnati.

(c) The removal of the tracks from certain streets, notably Scott Street south of Fourth, and the double

tracking of other streets covered by pre-existing grants, notably Greenup Street; also two extensions of existing routes. The net result of these changes in trackage was to reduce the mileage of the South Covington Company in Covington from about 15 miles to 11-4/10 miles. The new mileage by way of extensions was very small (R., 142).

The cost of this work, by way of new construction and change of tracks, was about $250,000.

It was distinctly agreed that the compromise ordinance was a mere postponement of the controversy and not a waiver by either party of its claims. The ordinance expressly provided (App. 35; R., 97-98):

> "It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by said company, and are now the subject of litigation between the said city and the said company; but it is distinctly understood and agreed by both the said city and the said company that said city and said company will, if the court in which said suits are pending should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have all questions between said city and said company determined in the court in which said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties thereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by

both the City of Covington and the said street railway company that neither the said city nor said company, by the passage and acceptance of this ordinance, in any way admits, waives, relinquishes, prejudices or affects their respective rights and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits."

For some reason which does not appear of record, the suits in question were shortly thereafter dismissed without prejudice, probably because the making of the compromise rendered them moot cases.

6. Ordinance of April 26, 1894 (R., 105), authorizing the double tracking of a portion of Third Street.

7. On July 11, 1901 (App. 49; R., 106), an ordinance was passed and later accepted by the company reciting that the City of Covington had requested the company to change its tracks from Second Street between Scott and Greenup Street, Greenup between Second and Park Place, and Scott Street, between Second and Park Place (its access to the Suspension Bridge) back to Court Street and Park Place, the original access to the Suspension Bridge prior to the ordinance of June 8, 1882, and authorizing such change to be made.

The city desired to widen Court Street between Third Street and Park Place, and as appears from the ordinance, the South Covington & Cincinnati St. Ry. Co. gave the City a strip of land twelve (12) feet wide, between those streets for that purpose.

It was expressly provided by Section 5 (App. 53; R., 108-9) that the rights and obligations of the parties on the new streets should be the same as on the old. As

the company had a perpetual franchise on the old streets, its rights on the new streets were also perpetual.

The change of tracks provided for in the ordinance was made, the company thus giving up six or seven blocks in exchange for four.

A tax payer, Frank Woodall, brought suit in the State Courts to require the removal of the tracks, on the ground that the ordinance, not having been preceded by public offer and bidding, as required by the constitution, conferred no rights on the company. But the lower court and the Court of Appeals held that the ordinance was a valid modification of the existing franchise of the company. The Court of Appeals said, *Woodall* v. *South Covington & Cincinnati St. Ry. Co.*, 137 Ky., 512, 517:

> "When the ordinance was passed the street railway company had a franchise to operate its cars in the city of Covington. They then had the right to use for this purpose Scott, Greenup, and Second Streets, as their tracks were then laid. The purpose of the arrangement between the city and the street railway company was not to grant an additional franchise but simply to relocate the tracks of the street car company so as to be better for the city and better for the traveling public. The city secured the widening of Court street and the freeing for two squares of Greenup and Scott Streets, and the street railway company secured a better approach to the bridge. It gave up its rights in Greenup and Scott Streets, and also surrendered to the city the piece of land which it owned. The city has taken possession of the land and enjoys all the fruits of the contract."

The system established by the various grants above named was in existence and operation on July 14, 1913,

when the ordinance complained of in the bill (R., 109) was passed. It is that system which is described in the decree herein, and shown on the map attached to the Appendix.

ROSEDALE ORDINANCE.

Reference is made in the Record to the Rosedale ordinance, although it is not directly involved herein. This was a grant made in October, 1890, to the Cincinnati, Covington & Rosedale Railway Co. for a period of fifty years, over certain streets in the City of Covington (R., 90). The road was built by the South Covington Company and has since been operated by that company (R., 156) as a part of its system.

The ordinance complained of in this case, which undertakes to grant a new franchise covers the route of the Rosedale grant as well as of the South Covington grants proper.

The bill and the decree, however, relate only to the South Covington grants, heretofore described in detail.

THE ORDINANCE OF JULY 14, 1913, IMPAIRS THE CONTRACT RIGHTS OF APPELLEE.

If appellee has the rights claimed by it, the City does not deny that the grant of a franchise under the ordinance of July 14, 1913, would violate and impair them.

The routes set forth in that ordinance (R., 109, 110, 111) are exactly the routes operated by appellee, except about 2,000 feet on Western Avenue, where there are no tracks.

The undisputed evidence of Mr. Harton (R., 144, *et seq.*) shows that no additional street car lines could be

built or maintained thereon without destroying appellee's rights. (*Elliott on Roads and Streets*, Sec. 746 and cases; *Traction Company* v. *Transit Co.*, 69 O. S., 402, and cases cited.) Practically all of its eight miles of double track is on streets 40 feet or less in width. Its mileage of single track is on streets about 27 feet in width (R., 145). Practically all of the tracks, double and single, are located in the middle portion of the streets, as directed by the City Engineer. (R., 143-4.) The ordinance here in question provides for the tracks to be laid in the middle portion of the streets.

When the ordinance was adopted the plaintiff protested, claiming that it threatened an impairment of plaintiff's rights (R., 27) and the City Council responded by concurring in the report of its committee that

> "all of the franchise rights held or owned and operated or controlled by the South Covington and Cincinnati Street Railway Co. have expired; that the company is now operating on the streets in the City of Covington without license and without right."

Under Section 3, Article 2 of the ordinance plaintiff could not have made a successful bid without surrendering its claim of franchise rights.

As alleged in the bill, the purpose of the ordinance of 1913 was, not to provide a parallel system of street railway but to terminate the operation under plaintiff's franchises. The twenty year truce, provided in the ordinance of October 7, 1892 (App. 34; R., 96), expired in 1912, and the City was renewing its contest which had been suspended by that truce.

The bill alleges (R., 8) and the answer admits (R., 22) that the City of Covington claims that all of appellee's

franchises have expired and that the purpose of the ordinance of July 14, 1913, was to grant a new franchise in place thereof.

The court below said that "rightly interpreted the ordinance provides for the operation of another street railway on those streets in exclusion of plaintiff" (R., 164).

The ordinance presented a clear case for the interposition of the District Court as a Federal Court (*City Railway* v. *Citizens Railroad Co.*, 166 U. S., 557, 563), and as a court of equity (*Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S., 65, 82; *Roberts* v. *Louisville*, 92 Ky., 95, 107-8.)

We respectfully submit that the decree of the District Court should be affirmed.

RICHARD P. ERNST.
ALFRED C. CASSATT,
FRANK W. COTTLE,
Counsel for Appellee.

15

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No. 225.

Supreme Court of the United States.

OCTOBER TERM, 1917.

CITY OF COVINGTON,
Appellant,

versus

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellee.

Appendices to Brief for Appellee, The South Covington & Cincinnati Street Railway Company.

COURT INDEX PRESS, 646-650 Main Street, Cincinnati, Ohio.

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Supreme Court of the United States.

October Term, 1917.

CITY OF COVINGTON,

Appellant,

No. 225. *vs.*

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,

Appellee.

Appendices to Brief for Appellee, The South Covington & Cincinnati Street Railway Co.

APPENDIX I.

COMPILATION IN CHRONOLOGICAL ORDER OF CHARTERS, ORDINANCES, ETC., SHOWING TITLE OF THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

1. The Abbott Grant and Supplements.

COUNCIL PROCEEDINGS, DECEMBER 13, 1869, ORDINANCE AUTHORIZING ABBOTT CONTRACT. (R., 60.)

Book H, page 610. Council meeting DECEMBER 13, 1869. The petition of E. F. Abbott, asking Council to take

from the table proposition of himself and others to build a street railroad and act upon the same, was taken up and the proposition, together with all papers concerning same, were read and discussed when the following ordinance was presented, which was read and the yeas and nays being called, passed, and is as follows, to-wit:

"An ordinance authorizing a street railroad on certain streeets.

Be it ordained by the City Council of Covington, that all the authority and right that the city of Covington has the capacity to be and the same is hereby granted to E. F. Abbott, J. B. Redgate and J. C. Blick, their associates, successors and assigns, to construct, hold and operate a street railroad upon and along Scott street, from Fourth street to Sixteenth street; Sixteenth street from Scott street to Madison street; Stevens street, from Sixteenth street to Austin street and Austin street from Stevens street to Williams street. In case the Covington Street Railway Company shall file with this council a written agreement, relinquishing their right of way on Greenup street from Fourth to Powell street and along Powell to Scott street in favor of Abbott and Company, then said Abbott and Company shall construct their road on Greenup street instead of Scott street, in accordance with their proposition for making the same on Scott street; also to construct, hold and operate a street railroad upon and along Fourth street from Scott street to Bakewell street, Bakewell street, from Fourth street to Riddle street; Riddle street from Bakewell street to Philadelphia street and on Philadelphia street, from Riddle street to the Lexington pike.

Said grant is upon condition and in consideration of the strict and faithful performance, by said grantees, of

all the terms, stipulations and covenants, contained in a certain written agreement made by and between said city and grantees, of even date herewith, and of record on the minutes of said council; and said grant shall determine upon failure of such performance."

AGREEMENT.

This Agreement, by and between the city of Covington, Kentucky, of the first part, and E. F. Abbott, J. B. Redgate and J. C. Blick, their associates, successors and assigns, of the second part, etc.

(Here follows form of agreement as subsequently executed December 23d, 1869, see *infra.*)

COUNCIL PROCEEDINGS, DECEMBER 23, 1869, ABBOTT CONTRACT. (R., 64.)

Book H, 632-637. DECEMBER 23, 1869.

Mr. Cushing presented the contract between the City of Covington and E. F. Abbott, S. J. Redgate, etc., for the right of way to construct, hold and operate street railroads on certain streets, which is as follows:

"AGREEMENT.

This Agreement, by and between the City of Covington, Kentucky, of the first part, and E. F. Abbott, S. J. Redgate and J. C. Blick, their associates, successors and assigns, of the second part,

WITNESSETH: That in consideration of the terms, stipulations and covenants hereinafter made by the said party of the second part, the said party of the first part

hereby agrees to grant unto the said party of the second part all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott street, from Fourth street to Sixteenth street; thence upon and along Sixteenth street, to Madison street; also, along and upon Sixteenth street to Stevens street; then along and upon Stevens street to Austin street; thence upon and along Austin street to William street.

Said railroad on all of said streets, shall consist of a single track, upon which cars shall be run both ways, with suitable turn-outs for passing, not to exceed seventy-five (75) feet, at the intersection of other streets, with the streets above named, as hereinafter specified.

In consideration whereof, the said party of the second part, hereby covenants and binds itself with and to the said party of the first part, as follows, to-wit:

1st. The construction of said railroad shall be commenced on Scott street, within four months from the date hereof, and said railroad shall be completed and in operation on said street, from Fourth street to Sixteenth street within nine months from said date; and said railroad shall be completed and in operation on Sixteenth street, Stevens street and Austin street, within one year from and after the said streets shall have been graded and paved, or otherwise improved, respectively.

2d. The track of said railroad shall be of the gauge of five feet two inches, and the rails shall have a tram of four inches, and flange shall be the same as is on the Covington and Newport Railway, which flange shall be placed and kept on a level with the surface of the street, outside of the track, the surface of the street within the track to be kept level with the same.

3d. Said railroad shall conform to the grade of said streets, as now established, or hereafter to be established, and when the city council of said city shall change the grade of any of said streets, as the same is now or may hereafter be established, said railroad shall be made to conform to the grade so changed.

4th. The said party of the second part, shall, at its own expense, replace, in as good condition as it was before, any part of said streets that may be removed in the construction of said railroad and shall use due precaution to prevent the obstruction of public travel, while said railroad is being built.

5th. Whenever said city council shall ordain the improvement or the rebuilding or repair of any of said streets between the points hereinbefore designated for said railroad, or any part thereof, between said points, the said party of the second part shall pay into the treasury of said city, immediately after said work shall have been completed and accepted by said council, such portion of the cost and expense of said improvement, rebuilding or repair, as, according to the estimate of the city civil engineer of said city, shall bear the same ratio to the entire cost and expense of said work, that the width of the space between the rails of said road, including the turn-outs, and also, including the space between the turn-outs and the main track, may bear to the entire width of the street from curb to curb, inclusive of the curbing.

6th. The said party of the second part shall, at all times, at its own expense, keep in good order and repair, with the same material and in the same manner as the remainder of the streets, all the space between the rails of said railroad including the turn-outs and the space

between any turn-outs and the main track, and also the street outside of each rail, to the width of twelve inches therefrom.

7th. The said railroad shall be located along the center of said streets, and the necessary turn-outs shall be made at such intersections of other streets, and located in such manner, as the city civil engineer of said city, by direction of said city council, may designate.

8th. The cars used on said railroad shall be of the best style and class in use on street railroads, and shall each be accompanied by a driver and a conductor, and shall be of sufficient number and run with sufficient frequency to properly accommodate the public. The charge to each passenger on said railroad shall never be greater than five (5) cents for any distance within the city limits, except when cars may be chartered for specific purposes; and children and teachers, going to or returning from school, shall not be charged more than one-half the established fare.

9th. The said party of the second part shall hold said party of the first part harmless from all damages, or claim for damages, that may be sustained or made by said party of the second part, or by any other person, from the breakage of any cistern, sewer, water or gas pipe, or for delay in the transportation of any passenger that may be caused by the construction or repair of any cistern, sewer, gas or water pipe, or of any public work, or from any other cause; and the said party of the first part shall always have the right and privilege of temporarily obstructing or removing the tracks of said railroad, whenever and for such time, as may be necessary for the building, rebuilding or repairing of any cistern, sewer, culvert, water or gas pipe, street or other work

ordered or authorized to be done by said city council, but whenever any such obstruction or removal shall have been made, said party of the first part shall, as soon as practicable, at its own expense place the portion of said track so removed or obstructed in as good condition as it was before. Said party of the second part shall also hold said party of the first part harmless from all damages or claim for damages sustained or made by any person or property, by reason of the existence of said railroad, upon said streets, or by the cars or servants of said road.

10th. The said party of the second part shall pay into the treasury of the said city, on the first day of January in each year, the sum of twenty-five dollars ($25) as a license tax for each and every car that may have been used on said railroad at any time within twelve months, next preceding said date.

11th. Upon the failure or refusal of the said party of the second part to abide and perform any of the foregoing promises and covenants by it made in addition to the remedies established by law, it shall be lawful for said party of the first part, upon giving five (5) days written notice, setting forth the matter complained of, to the said party of the second part, through its superintendent or other principal officer or agent, to prevent the running of the cars on said railroad, by removing the track of the same.

In addition to the foregoing the said party of the second part hereby agrees that the following rules shall govern the operation of said railroad to-wit:

1st. No motive power except horse or mule shall be used on said railroad, and no car shall be drawn at a greater speed than six (6) miles per hour.

2d. No car shall be allowed to stop on a cross-walk, or at the intersection of a street, except to avoid collision, or to prevent danger to persons on the street.

3d. When the conductor of any car is required to stop at the intersection of a street to receive or leave passengers, the car shall be stopped, so as to leave the rear platform slightly over the crossing.

4th. The conductor and driver of each car shall keep a vigilant watch for teams, vehicles and persons on foot (especially ladies and children) either on the track or moving towards it; and upon the first appearance of danger the car shall be stopped within the shortest time and space possible.

5th. The conductor shall not allow ladies or children to get upon or leave the cars while in motion.

6th. The conductor shall announce to the passengers the names of the streets and the places where the car crosses any other street railroad track.

7th. The cars after sunset shall be provided with signal lights.

And in consideration of the said premises, the said party of the first part hereby agrees to grant to the said party of the second part, all the right and authority that the said party of the first part has the right to grant, to construct, hold and operate a street railroad with suitable turn-outs to be hereafter located by said council, upon and along the following streets; provided, the construction of the same be begun within thirty days and completed within nine months from and after the date of this contract. Said road to be built and operated upon the same terms and conditions expressed in this contract, as to other street railroads therein specified, except, only, as to the time within which said road upon the streets

hereinafter specified, shall be begun and completed, to-wit: Commencing at the intersection of Scott and Fourth streets, thence west along Fourth street to Bakewell street; thence south on Bakewell street to Riddle street; thence west on Riddle street to Philadelphia street; thence south on Philadelphia street to the Lexington Pike.

In testimony whereof, the parties of the first part by the president of its City Council, duly auhorized thereto, and the said party of the second part, by E. F. Abbott, S. J. Redgate and J. C. Blick, for themselves, their associates, successors and assigns, have hereunto set their hands at said city this 23d day of December, A. D. 1869.

HOMER HUDSON,
President C. C. C.
E. F. ABBOTT,
SAML. J. REDGATE."

Said agreement was referred to Committee on Law with privilege of reporting this evening.

Mr. Casey, Chairman of Committee on Law, presented the following report on the contract between the City of Covington and E. F. Abbott, S. J. Redgate and J. C. Blick, to construct, hold and operate street railroads on certain streets.

Contract correct and your committee recommend that the President be authorized to sign it in behalf of the City.

(Signed) JAMES B. CASEY,
Chmn. Com. on Law.

Report concurred in.

Charter of Covington and Cincinnati Street Railway Company, January 21, 1870. (R., 68.)

An Act

To Incorporate The Covington and Cincinnati Street Railway Company.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

1st. That Edward F. Abbott, S. J. Redgate, Samuel V. Reid and B. R. Morton and their associates, be and are hereby declared a body politic and corporate, with perpetual succession under the name and style of "The Covington and Cincinnati Street Railway Company," and in such name to have full power to contract and be contracted with, sue and be sued, construct and manage railways in said city of Covington and vicinity.

2d. The capital stock of the company shall be two hundred and fifty thousand dollars, divided into shares of fifty dollars each, to be paid for thus: one dollar per share on subscribing and the residue on such calls as the directors shall prescribe; and if any call shall remain unpaid thirty days after due, the same may be collected by suit, or the company may forfeit the subscription, and all payments made thereon for the benefit of the corporation after thirty days notice to that effect being published in some newspaper or served upon the subscriber or his successor.

3d. That the persons named in the first section of this act, or any three of them, are authorized to receive subscription to said capital stock at such time and place or places as they shall deem expedient, and receive the

advanced installments; and whenever not less than five hundred shares shall be subscribed, may hold an election for five directors and shall preside at the same and give certificates to the persons elected directors. The election shall be by ballot, and stockholders may vote in person or by proxy and shall be entitled to one vote for each share held by him, and a plurality shall elect.

4th. The directors shall organize by electing one of their body president, and any three shall constitute a quorum for business. The board may appoint such officers, agents and employes as may be deemed necessary or proper, and prescribe their duties and fix their compensation; may make and ordain all necessary by-laws and rules for the management of the affairs of the company and its business, in the discretion of the president and directors; determine the time and place for holding the annual elections and from time to time may declare such dividends of the business of the company as the net profits shall justify.

5th. The business of said corporation shall be the construction and operation of street railways in said city and vicinity along such streets and public highways in the city as the council may grant the right of way to, and along such roads out of the city as the companies owning the road may cede the right to use of so much of the road or grade; and said city and such companies are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by mutual agreement, then the company may proceed to condemn the same, as in case of turnpikes and plank roads; when the track may be prepared for use and cars run thereon the company shall have the right to charge reasonable

rates of fare for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment, such passenger may be excluded from the car, *provided*, the company shall have the rate in print posted up in the car to plain view.

6th. The company may purchase and hold such real and personal estate, routes and railway tracks as may be deemed requisite for its use, and sell, exchange and convey the same at pleasure; and may erect or purchase such buildings, car-houses, shops, stables and offices for the use of the company as the wants and conveniences of the business shall seem to demand.

7th. Authority is hereby given to the company to connect with and use the track of any other railway company in said city and vicinity on equitable terms; that is, to pay such company fair compensation for the use of such tracks; and it may also borrow money on credit of the company and issue its bonds therefor, bearing interest not exceeding ten (10) per cent. per annum, and secure the payment of the same by a mortgage upon the property, rights and franchises and incomes of the corporation: *provided*, the bonds shall be payable after date at some particular place, and of not less denomination than one hundred dollars, and there shall be coupons attached thereto.

8th. The president shall be the chief officer of the company and shall perform such duties and possess such powers and receive such salary or compensation as the board may from time to time prescribe.

9th. This act shall be in force from its passage.

Approved, January 21, 1870.

Ordinance, December 28, 1874, Extending Time and Modifying Route. (R., 70.)

Book L, page 13. December 28, 1874.

An ordinance to extend the time to begin and complete certain street railway.

Be it ordained by the City Council of the City of Covington: That the time for the commencement of the work of constructing the street railway lines, set forth in the contract dated December 23, 1869, between said city of the first part, and E. F. Abbott, S. J. Redgate of the second part, be and the same is hereby extended to said Abbott and such associates as may become interested with him, for the time of six months, from the passage hereof, upon the terms, conditions and stipulations contained in said contract, as if the same were herein repeated. The said Abbott and his associates incurring all the liabilities and responsibilities therein provided and to enjoy all the rights and privileges therein granted.

2d. The route beginning at the corner of Fourth and Scott streets and running west of Fourth street, to be modified as follows, to-wit: To extend west on Fourth street to Main street and south on Main to Pike, east on Pike and crossing Madison to Cooper, thence to Scott and north on Scott street to beginning.

3d. This ordinance to take effect from its passage, provided said Abbott shall file within ten days in the city clerk's office his written acceptance of the provisions of this ordinance, continuing the obligations of his part of said contract and binding himself to complete said road within nine months from the passage of this ordinance and if not so completed the contract to be void.

ORDINANCE, JANUARY 28, 1875, MARKET STREET TO SUSPENSION BRIDGE. (R. 76.)

Book L page 51. JANUARY 28, 1875.

An ordinance to authorize the connection by street railway between the track on Fourth street in Covington and the Cincinnati Bridge.

Be it ordained by the Council of the City of Covington: That E. F. Abbott, his associates and assigns, upon completion of the street railway, on the Fourth and Main street route, granted by ordinance, dated December 28th, 1874, be and are hereby authorized to construct a line of street railway, from Fourth street north through Market street, and the alley immediately north thereof, to and across Second street, with necessary turnouts to make connection between the tracks crossing the Suspension Bridge, and that traversing Fourth street, the track to occupy the center of said street and alley, and to be constructed after the same manner as the tracks along other streets, which said Abbott, associates and assigns are authorized to construct. Provided, that in case of change in the width or grade of said street or alley, the said Abbott, associates or assigns, shall at his or their own expense make such change in the location or grade of the track as the City Council may direct.

DEED FROM ABBOTT AND ASSOCIATES TO THE COVINGTON AND CINCINNATI STREET RAILWAY CO., MAY 1, 1875. (R. 71.)

WHEREAS, By virtue of an act of the Kentucky Legislature entitled: "An act to incorporate The Covington and Cincinnati Street Railway Company," approved January 21, 1870, Edward F. Abbott, S. J. Redgate and

Samuel V. Reid and B. R. Morton, and their assaciates, were incorporated under the above corporate name and authorized to construct and manage railways in Covington and vicinity, and said company have organized by the stockholders electing a board of directors.

And Whereas, The City Council of Covington, by a contract dated December 23d, 1869, granted the right of way to said Abbott and Company to construct a street railway along certain streets in said city.

And Whereas, The time for exercising said privileges elapsed without any work being done, and said City Council passed an ordinance on the 28th of December, 1874, entitled: "An ordinance to extend the time to begin and complete certain street railways," wherein all the rights granted by said contract of December 23d, 1869, were granted to said Abbott and his associates and assigns together with other privileges.

And Whereas, By another ordinance passed January 28th, 1875, by said Council, authority was given to said Abbott, his associates and assigns, to connect the track of said railway from Fourth street through Market street and the alley north thereof, with the tracks on the Suspension Bridge, and the said corporation having organized for the purpose of constructing said street railway lines are authorized by their charter and the said ordinances and obtained from said Abbott and associates all their rights and privileges under said charter and under said contract and said ordinances.

Now, Therefore, For and in consideration of the sum of one dollar, the said Edward F. Abbott, Samuel V. Reid and B. R. Morton, hereby sell, assign, transfer and set over to said Covington & Cincinnati Street Railway Company all the rights, privileges, franchises and interest which they or either of them have in and to said

charter, contract and ordinances and all interest vested in them thereby, the said corporation assuming all the liabilities and obligations of said grantors and agreeing to save them harmless in the premises.

To have and to hold the said rights and privileges and franchise to the only use, benefit of said street railway company, its successors and assigns, free from the claims of the grantors herein.

In Witness Whereof, They have hereunto subscribed their names this 1st day of May, 1875.

E. F. Abbott,
S. V. Reid.
B. R. Morton.

Ordinance Recognizing Ownership of Street Railway by Covington & Cincinnati Street Railway Co. June 24, 1875. (R., 75.)

An Ordinance Granting the Right of Way to the Covington and Cincinnati Street Railway Company for a Street Railway Track on Lower Market Space, Scott and Fourth Streets in Covington.

Be it Ordained by the City Council of Covington:

That the Covington & Cincinnati Street Railway Company be and are hereby authorized to connect their track on Market Street with that on Fourth Street, by running West on the North side of Market Space to Scott Street; thence south on Scott Street to Fourth; thence east on Fourth to Market Street, and the right of way through said streets is hereby granted to said railway company for said purpose, for the period of five years. That said tracks be constructed in the same manner as

the tracks which they connect are required to be constructed, and that they be held on the same conditions. Provided, however, that said company shall keep the streets in good repair between the rails (with like material as the streets) of said tracks and on the outside for a distance of twelve inches from the rails on both sides thereof, and where a track is already laid in any part of said way hereby granted, then one rail of the track now authorized shall be laid in the center of the existing track, and in the event of the removal of the old market house, now standing on said space, the city reserves the right to require the removal of this track to the center or such other position in said Market space, as shall be deemed proper by Council, at the expense of said railway company, and that the city shall incur no liability whatever on account of said grant.

Charter of South Covington and Cincinnati Street Railway Company, January 25, 1876. (R. 72.)

An Act to Incorporate The South Covington and Cincinnati Street Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That E. F. Abbott, B. R. Morton, W. O. Ford and S. C. Hermes, or those of them who shall act, their associates, successors or assigns, be, and are hereby, created a body corporate and politic, with perpetual succession, under the name and style of The South Covington and Cincinnati Street Railway Company, and in such name to have full power to contract, and be contracted with, sue and be sued, construct, operate and manage street railways in the city of Covington and vicinity.

Section Two. Said company shall have a capital stock not to exceed two hundred thousand dollars, divided into shares of fifty dollars each.

Section Three. The business of said corporation shall be the construction, operation and management of street railways in the city of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport, or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof.

Section Four. Authority is hereby given to the company to cross the tracks of any other company; also to connect with and use the track of any other railway company in the city of Covington and vicinity, on equitable terms—that is, to pay such company a fair compensation for the use of such track. In the event a mutual agreement can not be effected with such other company for the use of such part of its track as desired, then such use may be condemned by proceedings under a writ of *ad quod damnum*, as provided in chapter 110, entitled "Turnpike, Gravel and Plank Roads" in the General Statutes.

Section Five. The Board of Directors shall consist of not less than three nor more than five, as shall be determined from time to time by the By-Laws that may be ordained by the Board of Directors, also which shall prescribe the time, manner and place of their election. Each share of stock shall entitle the holder to one vote, either by himself or proxy, in writing, and the person having the highest number of votes shall be declared elected.

Section Six. The corporators in the first section mentioned, their associates, successors or assigns, shall organize said company, and shall constitute the first Board of Directors. The board shall elect one of its members president, and such other officers as may be deemed advisable; and may fill all vacancies occurring in the board; and may appoint such agents and employes as may be desired, and prescribe their duties and fix their compensation; and may make all necessary by-laws and rules for the management of the company; and may purchase and hold such real and personal estate, routes, railway tracks, bonds, notes or obligations as may be deemed requisite for its use, and sell, convey and exchange the same at pleasure; and may dispose of stock from time to time, and reissue such as may be acquired in the course of its business, whether taken for liens, debts or otherwise; they may borrow money on the credit of the company, at a rate of interest not exceeding ten per cent. per annum, and may execute the notes or bonds of the company, and sell or dispose of the same, when deemed advisable, for the use and benefit of the company; and to secure the payment thereof, or of any indebtedness of the company, may mortgage or pledge the whole or any part of the property, income and franchises of the company.

Section Seven. The company shall have the right to charge reasonable rates of fares for passengers, which

shall be payable on entering the cars; and if any passenger shall fail or refuse the payment such passenger may be excluded therefrom, provided the company shall have the rate in print posted up in the cars.

Section Eight. The president shall be the chief officer of the company, and shall perform such duties, and possess such powers, and receive such salary or compensation as the board may from time to time prescribe.

Section Nine. This act shall be in force from its passage.

Approved January 25th, 1876.

Amendment to Same, March 13, 1878. (R. 73.)

An Act to Amend the South Covington and Cincinnati Street Railway Charter.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That the said company be, and is hereby, authorized and empowered to construct, extend and operate its line of railway along Fourth street, from Scott street to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and this street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as it may designate, and as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully empowered to make such contracts and agreements with this street railway company.

Section Two. Said company may construct and operate any branch or branches to its main line which may be deemed advantageous; and may change lines, or consolidate them, or change locations of branches, remove tracks to new locations, the right of way being first obtained therefor.

Section Three: In the event of a failure to make an agreement with said bridge companies, or either, for the right of transit across the same with said railway of this company, or to effect an agreement with the proper authorities of either of said cities for the right of way, or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, street, or railway track, by proceedings by writ of *ad quod damnum*, as provided in chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

Section Four. This act shall be in force and take effect upon and after its passage.

(Superseded by the following):

AMENDMENT TO SAME, APRIL 5, 1878. (R. 74.)

(Legislative Grant on Fourth Street.)

An Act to Amend the Charter of the South Covington and Cincinnati Street Railway Company.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That the said company be, and is hereby, authorized and empowered to construct, extend and operate its line of railway along Fourth street, from

Scott street in the city of Covington to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and said street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully authorized to make such contracts and arrangements with said street railway company.

Section Two. Said company may construct and operate any branch or branches to its main line within the city of Newport which may be deemed advantageous, and may change such lines or consolidate them, or change the location of any of its branches, or remove its tracks to new locations, the right of way therefor having been first obtained from said city. Said city of Newport shall prescribe the terms and conditions upon which said railway company may operate and control said line, branches, changed lines and consolidations, constructed in said city of Newport, under the authority of this amendment.

Section Three. In the event of a failure to make an agreement with said bridge companies, or either of them for the right of way across the same with said railway company or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, or railway track, by proceeding by writ of *ad quod damnum,* as provided in chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

Section Four. The cars used on said lines of railway shall not be operated or propelled by steam power; the tracks thereof shall conform to the grades of the streets on which they are respectively located, and during the construction or repair, or reconstruction of such streets shall be taken up if necessay and replaced at the cost of said railway company; and said company shall have no claim for damages, by reason thereof, against said city of Newport, nor for any delay or hindrance thereby occasioned to the running of the cars of said railway company.

Seection Five. This act shall be in force from its passage.

Approved April 5th, 1878.

Deed from Covington and Cincinnati Street Railway Company to The South Covington and Cincinnati Street Railway Company, December 20, 1876. (R. 76.)

Whereas, All the stockholders of this company have consented to and authorized the sale and transfer of all the property, rights, credits, effects, right of way, grants and privileges of the same to The South Covington and Cicinnati Street Railway Company, and negotiations therefor having been effected with said company, by which the terms have been fully agreed upon:

Therefore, The Covington and Cincinnati Street Railway Company, a corporation under the laws of Kentucky, being empowered hereto, for and in consideration of the sum of five dollars in hand paid and of other valuable considerations, also of the undertakings and covenants of the said South Covington and Cincinnati Street Rail-

way Company, hereinafter mentioned, does hereby grant, bargain, sell, convey and confirm to the said South Covington and Cincinnati Street Railway Company, a corporation organized under an act of the Legislature of said commonwealth, approved January 25th, 1876, all the estate, real, personal and mixed of the grantor located in Kenton County, Kentucky, including rights of way, grants, railway tracks, turn-outs, turn-tables, land lots, buildings, stables, offices, cars, horses, mules, harness, tools, and all and every article and species of property, rights and credits of or belonging to the said Covington and Cincinnati Street Railway Company, or to which it has or is entitled to any interest or claim whatever, including all benefit of the contract with the Cincinnati Consolidated Street Railroad Company.

To have and to hold same and every part or parcel thereof, right thereto or interest therein, unto the only proper use and benefit of the said South Covington and Cincinnati Street Railway Company, its successors and assigns forever.

And the Covington and Cincinnati Street Railway Company covenants to and with the said South Covington and Cincinnati Street Railway Company, that it is the true and lawful owner and possessor of the said property and premises, rights and privileges, and has good right and full power to sell and convey the same in the manner and form herein expressed, and further that it will warrant and forever defend the title and right to said property and premises as free from and against the claims of all persons and parties whomsoever, except as to the existing mortgage bonds outstanding against the company and a balance of the purchase money owing upon a lot on Scott and Sixteenth streets. And the said South Covington and Cincinnati Street Railway Com-

pay does hereby covenant and agree to and with The Covington and Cincinnati Street Railway Company to observe, keep and fully perform all the obligations and undertakings of The Covington and Cincinnati Street Railway Company to the City of Covington in reference to the right of way in the streets of said city; and the grantee herein also covenants to pay off and discharge said mortgage bonds and said purchase money for the lot on the corner of Scott and Sixteenth streets, and to pay all other legal claims against and liabilities of the grantor now existing; and to save said Covington and Cincinnati Street Railway Company harmless and fully indemnified in the premises.

In Witness Whereof, The said Covington and Cincinnati Street Railway Company and The South Covington and Cincinnati Street Railway Company, by order of their respective Boards of Directors, have hereunto subscribed their corporate names and affixed the corporate seals by their respective presidents and attested by their several secretaries the date aforesaid.

The Covington and Cincinnati Street Railway Co.,
By E. F. Abbott,
President.

Attest: James A. Collins,
Secretary.

South Covington and Cincinnati Street Railway Co.,
By W. O. Ford,
President.

Attest: George M. Abbott,
Secretary.

Ordinance, October 13, 1881—Double Track on Court Avenue—Recognition of Abbott Grant. (R. 79.)

Book O, page 681. October 13, 1881.

Whereas, The South Covington and Cincinnati Street Railway Company has laid and is now using a single

track railway in the alley running from Third street, north to the Covington and Cincinnati bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public; therefore,

Be it Ordained by the City Council of Covington, That the South Covington and Cincinnati Street Railway Company, be, and the same is hereby, authorized to lay a double track on said proposed avenue, from Second street to Market space, so as to make connection with its track as now laid on Market space and Market street, and to use and to enjoy the same, as well as its track on Fourth and Scott streets, upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into between E. F. Abbott, etc., and the city of Covington, on the 23d day of December, 1869.

Provided, However, That the said South Covington and Cincinnati Street Railway Company shall file with the city clerk its written acceptance of this ordinance within ten days after its passage.

2. Grant June 8, 1882.

Report and Ordinance, June 8, 1882. Grant Over Covington Street Railway Co. Routes. (R., 79.)

A regular meeting of the City Council of Covington, was held at the Council Chamber, Thursday evening, June 8th, 1882, President Prague in the chair and all members present.

To the Hon. President and Members of the City Council:

Gents—Your Committee on Rail Roads and Bridges to whom the within communication was referred, would most respectfully report in favor of the passage of the accompanying ordinance, which provides for Court Avenue and Park Space to be free from St. Railroad tracks.

ALEX. DAVEZAC,
T. J. SMITH.

Report of Committee concurred in, and the accompanying ordinance, having been duly read, was passed, to-wit:

An Ordinance granting the right of way over certain streets in the city of Covington, to the South Covington and Cincinnati Street Railway Company.

Sec. 1. *Be it Ordained by the City Council of Covington,* That the South Covington and Cincinnati Street Railway Company be, and the same is hereby authorized to contract with The Covington Street Railway Company for the right of way over and along the streets specified in the contract between the said Covington Street Railway Company and the city of Covington, dated August 15th, 1865, and, the consent of the latter, company having been obtained, the said South Covington and Cincinnati Street Railway Company is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ordinances regulating its right to the streets now occupied by said South Covington and Cincinnati Street Railway Company. *Provided, However,* and the rights hereby granted are upon this condition: That the said South Covington and Cincinnati Street Railway Company shall within thirty days after the passage of this ordinance remove its track on Court avenue and Park place and relinquish all rights

and claim to the same; but in the event the city authorities shall hereafter authorize any other street railway company or companies to occupy and use said avenue or Park place for street railway purposes, then the said South Covington and Cincinnati Street Railway Company shall have the same right to use said avenue and Park place that it now possesses under existing ordinances; and *Provided*, also, that said company shall have the right to make such curves and connections as may be necessary to connect its track with the tracks on Greenup and Scott streets.

Sec. 2. This ordinance shall take effect from and after its passage, provided that the said South Covington and Cincinnati Street Railway Company shall within ten days from the date hereof file their written acceptance of the same with the city clerk."

JULY, 1882, CONTRACT BETWEEN COVINGTON STREET RAILWAY COMPANY, AND SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY. (R., 34.)

THIS AGREEMENT, entered into between the Covington Street Railway Company, a corporation under an act of the General Assembly of the Commonwealth of Kentucky, approved February 9th, 1864, of the first part, and The South Covington & Cincinnati Street Railway Company, a corporation under an act of the same General Assembly, approved January 25th, 1876, of the second part, *witnesseth*:

That the party of the first part, in consideration of the covenants to be performed and money to be paid by said party of the second part as hereinafter stipulated, hereby grants permission to the said party of the second part

to construct and operate street railways over the streets specified in the following routes, so far as said party of the first part may do so under the laws of Kentucky, and the ordinances of the city of Covington, the said routes being designated as follows in a certain agreement between the said party of the first part and the city of Covington.

GREENUP STREET ROUTE, OR NO. 1.

Commencing at the corner of Scott and Front running south to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over the same route to Third street, continuing north on Greenup street to Second, west on Second to Scott, to same place of starting; to be a single track route with turn-outs at the following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

MADISON AVENUE ROUTE, OR NO. 2.

Commencing corner of Scott and Front, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third, turn-outs at the following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth streets.

PIKE AND BANKLICK STREET ROUTE, OR NO. 3.

Running over the Madison street route to Sixth street, thence on Sixth to Washington, south on Washington to

Pike, west on Pike to Banklick, south on Banklick to Fifteenth, east on Fifteenth to Madison, a double track on Pike from Banklick to Washington, on Washington, to Sixth and on Sixth to Madison, and turn-outs at the following intersections of streets with Banklick: Eleventh, Thirteenth and Fifteenth streets.

Main Street Route, or No. 4.

Running over that portion of the Madison street route from corner of Front and Scott streets to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York, a single track with turn-outs at the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York, returning over the same route.

Third Street Route, or No. 5.

Running over the Main street route to Main, west on Third to Bullock, south on Bullock to Second, returning over the same route, a single track with turn-outs at the intersections of the following streets: with Third, Philadelphia and Bullock.

And the said party of the second part, for the privileges herein granted, hereby covenants to pay at the end of each and every year, for a period of eight years, beginning August 15th, 1882, the sum of two hundred and fifty dollars to the city of Covington, said city having duly authorized said party of the second part by ordinance, approved June 8th, 1882, to use the streets men-

tioned in said routes for street railway purposes, and the said party of the first part having obligated itself to pay the said sum of two hundred and fifty dollars annually until August 15th, 1890, to said city in consideration of the right of way over said streets, as will appear by reference to said agreement between said party of the first part and said city, dated August 15th, 1865, the payment of which sum for the year ending August 15th, 1883, and annually thereafter, until the expiration of the said term, is assumed by said party of the second part.

It is further expressly agreed that the privilege herein granted shall not be regarded as an abandonment on the part of the said party of the first part of its right to construct and operate street railways over said streets.

In Witness Whereof, said companies have caused their corporate names to be subscribed by their president and their corporate seals to be affixed, attested by their respective secretaries, this —— day of July, 1882.

COVINGTON STREET RAILWAY COMPANY,
By JOHN A. WILLIAMSON, *President.*
B. R. MORTON, *Secretary.*

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
By E. F. ABBOTT, *President.*
JAS. A. COLLINS, *Secretary.*

3. Ordinances Extending or Modifying Routes.

ORDINANCE OF AUGUST 28, 1884. (R., 82-84.)

This ordinance authorized the company to extend its double track on Madison Street from Twelfth Street south to the Southern terminus of the route or the corporation line (at about Twentieth Street).

ORDINANCE OF JULY 7, 1887. (R., 84-86.)

This ordinance authorized what was known as the Austinburg extension on Powell, Rickey, Oliver, Edward, Seventeenth and Scott Streets. It substituted an annual payment to the city of $2,600 in lieu of all obligations for street repairs on the entire system.

ORDINANCE OF AUGUST 5, 1889. (R., 86-88.)

This ordinance authorized the substitution of electric power and cars for horse power and cars.

(The last three ordinances mentioned were in the nature of extensions or modifications of the existing routes and upon the same terms and conditions and for the same duration as the existing grants.)

PROCEEDINGS OF COUNCIL IN SEPTEMBER, 1890, FOR RE-SALE OF COVINGTON STREET RAILWAY ROUTES. (R., 88.)

Record W., p. 18, September 11, 1890.

WHEREAS, the franchise of The South Covington & Cincinnati Street Railway Co., or that part of it known as the Covington & Cincinnati Railway Co.* (White Line) expired August 15, 1890, last month;

Therefore be it resolved by the City Council of Covington that the matter of advertising the said Covington & Cincinnati Railway Co.* (White Line) Franchise for sale be referred, to a Special Committee of three in conjunction with Committee on Law and City Solicitor.

(Signed) T. W. SANFORD.

Adopted, and Messrs. Sandford, Holtrup and Von Bokern appointed on said Special Committee.

* An error in name. See Report below.

Sept. 18, 1890, page 43, Book W.

Mr. Sandford, Chairman of a Special Committee, presented the following report:

To the Council:

Your Special Committee and Committee on Law, to which was referred the resolution of T. W. Sanford with reference to the matter of advertising for sale the "Franchise" of the Covington Street Railway Company, report that they have examined into the rights of the Street Railway Company to the routes granted to the Covington Street Railway Company by the City of Covington and are of opinion that the period for which these routes were granted has expired, they therefore recommend that the City of Covington through some authorized committee or its City Clerk offer for sale for a period of 25 years to the highest and best bidder and conformable to the ordinance entitled, "An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington," passed December 13, 1864, and as amended August 3d, 1865, by ordinance entitled, "An ordinance to amend an ordinance approved December 13, 1864, entitled, 'An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington.'"

(Here follows description of same routes as on pp. 29, 30, *supra.*)

Your Committee further recommend that the City Council before the time fixed for said sale select a person who shall act in conjunction with two others, one to be chosen by the owners of the R. R. property and the other to be chosen by the bidder of said property, whose

duty it shall be to value all the property of the owners of the railroads operating on the aforementioned routes.

(T. W. Sanford, H. Von Bokern, Henry Holtrup)
Special Committee.

(H. P. Whitaker, Joseph Hermes, William Blick)
Comtee. on Law.

Report concurred in and the following Special Committee appointed, viz: Messrs. Whitaker, Droege and Moser, who in connection with the City Solicitor are to take charge of the matter of advertising, etc.

ORDINANCE OF JANUARY 3, 1891. (R., 93.)

This ordinance granted the company the right to lay and maintain tracks to connect its Madison Avenue tracks with the car barn on the corner of State Street and Madison Avenue.

COMPROMISE ORDINANCE OF OCTOBER 7, 1892. (R., 96.)

Board of Council 3, page 155.

An Ordinance in Relation to The South Covington and Cincinnati Street Railway Company.

Section 1. *Be it Ordained by the Common Council of the City of Covington,* That in consideration of the South Covington and Cincinnati Street Railway Company within twenty days after the acceptance of this ordinance, reducing and maintaining during the term of the contract period herein provided for, a reduced cash fare of five cents, and no more, for one continuous ride upon its cars, from any point on its lines in the city of Covington, as

the said corporate limits now are, or may hereafter be extended, to Fourth St. or to Fountain Square in the City of Cincinnati, and from Fourth street or Fountain Square, in the City of Cincinnati, to any point upon its line in the City of Covington, as its corporate limits now are, or may hereafter be extended, it being understood that the said company shall carry passengers to Fountain Square, in the said City of Cincinnati, only in case it shall continue to operate its lines to said Fountain Square, otherwise to Fourth street, in Cincinnati, the transferring from one car or line to another car or line, shall be held to be a continuous ride, and said company shall transfer in accordance with the provisions of an ordinance of August 5th, 1889, that is, All lines running north and south shall transfer to those lines running east and west, and all lines running east and west shall transfer to those lines running north and south, and in consideration of the said company, within six months after the passage of this ordinance removing its tracks from Scott street, south of Fourth St. to the southern terminus of said track and putting said street back in as good condition as the rest of the street, and to the satisfaction of the common council, and double tracking Greenup street, from 2d to Powell, thence with a single track along what is known as the Austinburg extension around to 17th and Greenup; also a double track from Powell and Greenup south on Greenup to 17th St., except where the street is less than thirty-five feet in width in Patten's subdivision which distance shall have a single track, thence south from 17th and Greenup with a double track along Greenup to State, thence with a double track west on State street, to Madison Ave., and shall electrically equip and operate all those routes heretofore or hereafter named in this ordinance with modern electric

cars and appliances, and put back all streets where tracks are removed or laid in as good condition and with the same material as the rest of the street, and to the satisfaction of the common council and according to the direction of the city engineer. The double tracks on Greenup and State streets, are to be placed as near the center of said street as it is consistent with public safety and convenience, and in consideration of the said company, within ten months from the acceptance of this ordinance removing its tracks from Powell St., between Madison Ave. and Greenup St.; from 17th St., from Greenup to Scott, and from Banklick, from Pike to 15th St. and from 15th street, from Banklick to Russell, replacing said streets, in as good condition and with the same material as the rest of the said streets, and to the satisfaction of the common council; and in further consideration of the said company removing its tracks from Cooper street, between Madison Ave., and Scott street, and replacing said street, in as good condition as the rest of the street, and with the same material to the satisfaction of the common council and according to the direction of the city engineer; and in further consideration of the said street railway company releasing the said city of Covington from all claims for loss, expenses or damages by reason of the reconstruction of its tracks on the streets now being made with asphalt, the city of Covington does hereby agree for a period of twenty years from and after the date of the acceptance of this ordinance by said street railway company, that it will not offer for sale or sell, or attempt to sell, any of the rights, franchises, rights of way or privileges now held used or enjoyed by the said street railway company in the city of Covington and to that end the resolution passed by the city council of the City of Covington on the 11th and 18th

days of September, 1890, directing the sale of certain rights, is hereby withdrawn, and the suit now pending in the Circuit Court of the United States, for the Sixth Judicial District and District of Kentucky at Covington, to-wit: The South Covington and Cincinnati Street Railway Company, complainant, vs. The City of Covington, defendant, and the suit of W. A. Goodman, trustee, complainant, vs. The City of Covington, defendant, in the same court pending, shall be prosecuted to a final determination and judgment or judgments, which shall fix and determine the rights of the litigants; *provided, however,* that if the court in which the said suits are pending should, after the passage and acceptance of this ordinance, refuse to hear or try the issue of said cause or causes, or should dismiss the said causes without deciding the question at issue therein or trying said causes should decide the issue in favor of the city, then and in either of the said events, the city hereby agrees to postpone the enforcement of any of its claimed rights to sell any of the franchises of the said company for a period of twenty years from and after the acceptance of this ordinance, and during said period of twenty years it will not attempt to sell or offer to sell any of said franchises; and should said court decide against the city, or any court to which said question may come decide adversely to the city, then said company will not take or use any advantage of said decision until the expiration of the term of twenty years herein granted said company. It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed, to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by the said company and are now the subject of litigation between the said city and the said company,

but it is distinctly understood and agreed by both said city and the said company, that said city and said company will, if the court in which said suits are now pending should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have all questions between said city and said company determined in the court in which the said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties hereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company. It is further understood, and agreed by both the city of Covington and the said street railway company that neither the said city or said company by the passage and acceptance of this ordinance, in any way admits, waives, relinquishes, prejudices, or affects their respective rights, and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits. The agreement between the said street railway company and the said city of Covington, as above provided is made upon the following terms and conditions and all of them, viz:

1. That the said South Covington and Cincinnati Street Railway Company shall, within twenty days after the acceptance of this ordinance, reduce the rate of fare for carrying passengers from any point on its line within the limits of the city of Covington, as the said corporate limits now are, or may hereafter be extended, to any

point on its line in the city of Cincinnati, as hereinbefore provided, or from any point on its line in the city of Cincinnati as hereinbefore provided, to any point on its lines within the corporate limits of the said city of Covington, as the corporate limits now are or may hereafter be extended, to a five-cent cash fare, and no more, for each passenger, and to maintain the said reduced rate of fare during the compromise period herein agreed upon, to-wit: Twenty years from and after the acceptance of this ordinance, and in consideration of the said reduced rates of fare between said cities of Covington and Cincinnati, the said street railway company may charge and collect a five-cent cash fare, and no more, for passengers riding on its line within the present or future corporate limits of the city of Covington.

2. It is the agreement by said company with the city of Covington that the five-cent fare shall apply to and extend over each and every line of street railway in the city of Covington, on and over which the cars of said company may run or be operated during the term herein granted, not only within the corporate limits of the city, but to and from Cincinnati.

3. The cars on Greenup street and Madison avenue shall be operated as a belt line over State street, so that the cars shall pass both ways on said streets.

4. The South Covington and Cincinnati Street Railway Company shall also run its cars out on the Lexington pike at least five hundred feet south of the intersection of the Pike and Twelfth streets within sixty days after the city gets possession of said pike, and the right is hereby given said company to so extend its line when the city has obtained control over said road.

5. The said street railway company shall, within six months after the passage of this ordinance, remove its

track from Scott street, south of Fourth street, and from Cooper street, between Madison avenue and Scott street, and shall connect its track on Pike street with the track of the said railway as now laid on Madison avenue, and Pike street, so that the cars of said company may pass to and from the tracks on Pike street, and Madison avenue, and shall double-track Greenup street, as above provided, and extend its single track along what is known as the Austinburg extension around to Seventeenth and Greenup; also a double track from Powell and Greenup south on Greenup to Seventeenth, except where the street is less than thirty-five feet in width, in Patton's subdivision, which distance shall have a single track, thence south from Seventeenth and Greenup with a double track along Greenup to State, thence with a double track west on State street to Madison avenue; and said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6 A. M. to 5 P. M., and not to exceed five minutes from 5 P. M. to 8 P. M., and not to exceed ten minutes from 8 P. M. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart; and said street railway company shall have the right to lay and maintain tracks so as to connect its present system of tracks at the corner of Madison avenue and Fourth street with the railway tracks to be constructed on and over the proposed new bridge over the Ohio river, the Covington end of said proposed new bridge being at Fourth street and Madison avenue, in the city of Covington, Ky.

6. The said street railway company shall, at its own expense, lay such foundation under its tracks, over which

cars are operated by electricity as aforesaid, as have been recently made under and along Madison avenue, from Fourth to State streets, and the work shall be done to the entire satisfaction of common council, and the said company shall put back any street from which its tracks are removed, or on which its tracks may be laid, in as good condition as the rest of the street. The city reserves the right to change the grade of the streets over which said railway routes are located, both as to curve and crown of the same, and the said railway company shall defray the expense, at any time the council may direct, of lowering or elevating such tracks so as to conform to the said change of grade, and place a foundation such as is hereinbefore provided for; and further, that said street railway company shall operate all its lines by electricity as a motive power, using no horses or mules, and all poles to be hereafter erected by said company shall be of iron or steel, both along the new routes, and also along the old, when new poles are needed, and so placed as not to interfere with or obstruct driveways. And the city of Covington expressly reserves the right and power to require all the wires of said company used overhead to be placed under ground at the expense of the company whenever deemed proper or expedient, and the South Covington and Cincinnati Street Railway Company also can, upon thirty days' notice in writing to the mayor of the city, put the said wires under ground whenever it so determines, unless sooner ordered by the city of Covington; and the said street railway company binds itself to replace all streets where the wires are put under ground at its own expense and to the satisfaction of common council. That from or after the period of five years from the acceptance of this ordinance by the street railway company, said company shall contract for and

adopt the best mode and manner of rapid transit, and the best way and manner then obtainable between the cities of Covington and Cincinnati, and through the city of Covington, it being understood that the said company shall then use the bridge or bridges between said cities which shall at the time afford the best facilities for rapid transit between Covington and Cincinnati; and if after the expiration of the period of five years there is no better mode of rapid transit between the cities of Covington and Cincinnati across the Ohio river, the said company or its successors or assigns shall as soon thereafter as a more rapid mode can be obtained adopt and use said mode. And whatever tracks along its routes in the city of Covington are not in operation, as herein provided, after a period of ten months from the passage of this ordinance, shall be removed at the expense of the street railway company, and the streets put back immediately, where said tracks have been removed and in as good condition as the rest of the street, and with the same material, and whatever portion of the routes that are not, after a period of ten months after the acceptance of this ordinance, equipped and operated in the said city of Covington with electricity, shall be forfeited to the said city of Covington.

7. That the said street railway company shall release the city of Covington from any and all claims for damages, loss or expense incurred by it for or on account of the said street railway company in removing or relaying its tracks on the streets in the city of Covington, now being or hereafter to be made with asphalt, under the provisions of a resolution passed by the common council of the said city on the fifteenth day of October, 1891, requiring said improvements to be made by said street railway company, and the said street railway company shall

continue to remove and relay its tracks and place the foundation as required, at its own expense, under and over the streets now ordered to be improved with asphalt, until the said work is completed.

SECTION 2.

In consideration of the said street railway company removing its tracks from Scott street, Powell street, Seventeenth street, Cooper street, Banklick street and Fifteenth street, and double tracking Greenup street and State streets, as hereinbefore provided, the said city of Covington agrees and covenants with the said South Covington and Cincinnati Street Railway Company, its successors and assigns, that it will not grant to any other company or companies, corporation or corporations, association or associations, individual or individuals, any right, privilege or franchise to lay, maintain or operate its street railroad or street railroad track, or any other system of passenger traffic, on or over the streets so abandoned without giving to the said street railway company the same rights and privileges that are enjoyed by any other company, corporation, association or individual on the said streets, or any of them; the terms of the joint use to be settled by arbitration, each party to select one, and those two a third party, who shall decide all differences. The city of Covington expressly reserves the right to exact a bonus or consideration from this company, as well as all others, for the use of such streets as are now abandoned by this ordinance, as well as for the use of all other streets that may be hereafter granted. The city reserves the right to permit any companies to cross the tracks of the said South Covington and Cincinnati Street Railway Company wherever located.

SECTION 3.

The said street railway company shall, upon notification from the mayor of Covington that the city is prepared to proceed with the improvement of State street, between Madison avenue and Greenup street, and Greenup street between Seventeenth and State streets, proceed immediately after said notification to lay the proper foundation under the tracks, and lay its tracks on State street, between Madison avenue and Greenup street, and Greenup between Seventeenth and State.

SECTION 4.

The terms and conditions of this ordinance shall be accepted in writing by the said South Covington and Cincinnati Street Railway Company within twenty days after the passage of this ordinance, and the said acceptance in writing shall constitute this ordinance a contract between the said street railway company and the city of Covington for the purpose herein provided.

SECTION 5.

If at any time the South Covington and Cincinnati Street Railway Company fails or refuses to comply with the terms and provisions, or any part thereof, of this ordinance, the common council can, upon twenty days' notice being given of such breach, order the tracks of the said company to be removed from the said streets which are named herein for its new tracks, and upon failure of said company to remove the same, the said city can remove them at the cost of said company, and the said city of Covington reserves the right to repeal this ordinance for any breach of the same after twenty days' no-

tice to the said company. It is understood and agreed that the rights obtained under this contract and ordinance can not be assigned or sublet without the consent first being obtained from the common council of said city of Covington.

SECTION 6.

The right to tear up the tracks, or have the same done, for the purpose of improving or repairing sewers or laying gas or water pipes, or repairing the same, or making house connections with the same, or making any improvements, or doing any work which necessitates the tearing up of tracks, or displacements of wire, or removing of poles, is reserved to said city, and may be exercised by it after a reasonable notice to said company, and the said company shall, at its own cost, replace said tracks, wires and poles.

SECTION 7.

The said street railway company shall, before this ordinance takes effect and before said company acquires any rights under this ordinance, file with the city clerk a bond, to be approved by the common council, with resident state sureties, in the sum of $25,000, that it will save the city harmless from any and all loss or damage or cost to persons or property by reason of the construction and operation of said railway, and also condition for the faithful performance and carrying out of all the provisions of this ordinance and the common council can at any time require new or additional sureties upon said bond, and the said bond shall at all times be subject to the approval of the common council, and the remedies secured to the city by this bond are additional to the other remedies in this ordinance to the city.

SECTION 8.

The said company shall dedicate to the city and open for public use for street purposes the south half of Sixteenth street, between Scott and Madison avenue.

SECTION 9.

The said company shall pay to the said city of Covington each year during the first five years of the period of this contract the sum of $2,600, and each year during the second period of five years of the period of this contract the sum of $4,000, and each year during the third five years of the period of this contract the sum of $5,000, and each year during the fourth five years of the period of this contract the sum of $6,000, which yearly payments shall be in lieu of any and all car licenses or bonus. These sums shall be paid one-half on the fifteenth day of June and one-half on the fifteenth day of December, in each year. The said street railway company shall, within ten months after the acceptance of this ordinance, electrically equip and operate what is known as the Third street route, beginning at Third street and Madison avenue, and extending west on Third street to Bullock street, and north on Bullock street to Second street; and the company shall extend its said line west on Second street, from Bullock to the west corporation line of said city, and to lay proper turnouts on said line as it is now constructed or may be extended, so as to permit and facilitate the running of cars in opposite direction on said line. And permission is given to said company to connect its tracks at Fourth and Main streets with the tracks to be laid on the bridge of the Covington and Cincinnati Elevated Railway and Transfer and Bridge Company.

SECTION 10.

In full settlement and satisfaction of all claims of the city of Covington against said company on account of unpaid car licenses and bonus arising prior to the year 1893, the said company shall pay the city of Covington the sum of $1,500 immediately after the acceptance of this ordinance.

SECTION 11.

All the cars operated on the Greenup, Madison and State street lines running over the river, shall be operated as follows:

One-half the cars on leaving the suspension bridge shall proceed south on Madison avenue, east on State street, and north on Greenup on over the river, the other half of the cars shall on leaving the bridge proceed south on Greenup to State, west on State to Madison, and north on Madison on over the river.

SECTION 12.

Before a double track is laid on State street, from Greenup to Madison, as hereinbefore provided, State street shall be widened between said points, at the expense of the company, to a width of not less than forty feet between the curbing, with an eleven-foot sidewalk on each side of said streets; provided, however, if the land necessarily required to widen said streets can not be purchased at just or reasonable prices, then said company must, within sixty days after the passage of this ordinance, produce to the common council of the city of Covington satisfactory evidence that it can not purchase sufficient ground at reasonable or just prices from

the owners of the same; then the city will proceed to condemn said land to widen said street, and when said land is condemned, the car company shall pay all costs and damage of acquiring said land by said condemnation proceedings; the street car company to have the right to lay, maintain and operate a single track on State street between Greenup and Madison streets, until State street is widened so as to permit the laying of a double track on said street.

SECTION 13.

Said company, instead of operating its Austinburg line as it is now operated, shall extend its track out Edward street to the corporation line, thence west along the corporation line to Garrard street, thence north on Garrard street to State street, thence west on State to Greenup street; provided, however, that the construction and operation of this line by said company shall operate as a surrender to the city of Seventeenth street, from Edward to Greenup; and provided, further, that every alternate car which passes over said line shall pass down and over Madison avenue; any failure to comply with this provision shall also be taken as a breach of this ordinance.

SECTION 14.

In case the right of franchise has not been settled by the courts at the end of the term of this ordinance, then said street car company shall continue to pay semi-annually, as above provided, the sum of $7,500 per year until said suits are finally determined; and further, that the said company binds itself that the reduced rates of

fare mentioned in this ordinance shall continue until said suits are settled.

Approved October 7, 1892. No. 942.

(The changes in tracks were made as provided. R., 142.)

ORDINANCE JULY 11, 1901, CHANGING TRACKS FROM GREENUP, SECOND AND SCOTT STREETS TO PARK PLACE AND COURT AVENUE. (R., 106.)

Board of Council 12, page 379 *et seq.* July 1, 1901.

An ordinance of the City of Covington authorizing the South Covington & Cincinnati Street Railway Company to change its tracks from certain streets to certain other streets in the City of Covington.

Be it Ordained by the General Council of the City of Covington that,

WHEREAS, The South Covington & Cincinnati Street Railway Company now occupies a portion of Second Street between Scott and Greenup Streets, and Greenup Street between Second Street and Park Place, and Scott Street between Second Street and Park Place, and operates thereon a Street Railway, its tracks on said street connecting the tracks upon the Suspension Bridge with the various routes operated by said South Covington & Cincinnati Street Railway Company; and

WHEREAS, The City of Covington has requested that the said Street Railway Company should change its tracks and the operation of its Street Railway from said portion of said streets to Court Street, and Park Place, all as more fully set forth herein; and

WHEREAS, Said City of Covington desires to widen Court Street on the east side thereof between Third Street and Park Place, and the said South Covington & Cincinnati Street Railway Company is willing to give to said City a strip of land twelve feet deep along said eastern side of Court Street between Third Street and Park Place, from land owned by said South Covington & Cincinnati Street Railway Company; and

WHEREAS, In the opinion of the Council, the said change of tracks from the streets first above specified to Court Street and Park Place, will be for the benefit of said City and the convenience of its citizens, and of the traveling public;

Now, Therefore, Be it ordained by the General Council of the City of Covington:

SECTION 1.

That the South Covington & Cincinnati Street Railway Company is hereby granted the right of way, and is authorized and empowered to lay double tracks and to construct, operate and maintain its street railway from the tracks on the Suspension Bridge over and across Second Street at the angle, to the center of Court Street, thence along and over the center of Court Street to Third Street, and across Third Street and over Court Street as widened, as hereinafter set forth, to Park Place on a straight line with its tracks on Court Street, between Second Street and Third Street, and single or double tracks over and upon Park Place between Scott and Greenup Streets; and said South Covington & Cincinnati Street Railway Company is hereby authorized and granted the right of way to lay such curves, frogs, switches, and cross-overs as are necessary and proper

in its judgment to connect said Suspension Bridge tracks with the tracks of Court Street, and to connect the tracks on Court Street with the track or tracks on Third Street, and with the track or tracks on Park Place, also to connect its track or tracks on Park Place with its tracks on Scott Street and Greenup Street, and such other curves, frogs, switches, cross-overs and other rails or appliances as may be necessary and proper in its judgment to the full use and enjoyment of the rights herein granted; also to erect the poles and string the wires on and over said streets, which may be necessary or advantageous to the use of said right of way, and to the operation of said Street Railway, as hereinabove set forth.

SECTION 2.

The said South Covington & Cincinnati Street Railway Company is to commence the work of laying said tracks within a period of four (4) months from the date hereof, unless prevented therefrom by the said City of Covington or by delay in the improvement of said Court Street and Park Place; and said company further agrees within a reasonable time after the completion and operation of its tracks, as above set forth, to remove its present tracks on Greenup Street between Park Place and Second Street, on Second Street between Greenup Street and the Suspension Bridge, also on Second Street between the Suspension Bridge and Scott Street, also on Scott Street between Second Street and Park Place, and on Third Street between Court Street and Greenup Street; and said streets shall be put by said Company in as good condition and order as they now are under the direction of the City Engineer of the City of Covington.

SECTION 3.

It is hereby ordained and agreed on the part of the City of Covington that the right of way over said streets from which the tracks are to be removed, as herein set forth, and the right to construct, operate and maintain a street railway, or to lay its tracks thereon, or to construct, operate and maintain any other system of passenger traffic on and over said streets, shall not at any time hereafter be granted to any other person or corporation than the South Covington & Cincinnati Street Railway Company. In the event that the said City of Covington shall hereafter attempt to authorize any other person or corporation to occupy and use said streets, or any part thereof from which the tracks are to be removed, for street railway purposes or for the construction, operation and maintenance of any system of passenger traffic, then the said South Covington & Cincinnati Street Railway Company shall have and regain the same rights to use said streets, that it now possesses under existing laws and ordinances.

In the event that, for any reason, the rights herein granted to said South Covington & Cincinnati Street Railway Company in the first section hereof, shall be taken from said The South Covington & Cincinnati Street Railway Company, or said Company shall be prevented in any manner from exercising said rights, or in the event that said Company shall fail for any reason to effectually obtain said rights, it shall retain and possess in every respect the rights which it now has over and upon the streets mentioned in Section Two (2) hereof and the land conveyed by it to said City, as set forth in the next section hereof, shall immediately revert to it

The South Covington & Cincinnati Street Railway Company.

SECTION 4.

The rights herein granted to said Street Railway Company are granted in consideration of the benefits to the City of Covington as hereinabove set forth, and otherwise, and in consideration of the conveyance by the said South Covington & Cincinnati Street Railway Company of a strip of land on the east side of Court Street between Third Street and Park Place, fronting one hundred (100) feet on Court Street and being twelve (12) feet in depth, which shall be dedicated and deeded to the said City of Covington for said purposes for the widening of Court Street, after the passage of this ordinance, said land to revert to said South Covington and Cincinnati Street Railway Company upon the condition set forth in the preceding section hereof.

SECTION 5.

The rights and obligations of said City of Covington and the said South Covington & Cincinnati Street Railway Company shall be the same as to the streets mentioned in Section One (1) hereof as they now are with reference to the sereets mentioned in Section Two (2) hereof, under the laws and ordinances now in force relating thereto.

SECTION 6.

The said South Covington & Cincinnati Street Railway Company shall accept this ordinance in writing within thirty (30) days from its passage.

SECTION 7.

This ordinance shall take effect and be in force from and after its passage and approval by the Mayor.

Passed by the Board of Aldermen June 20th, 1901.

Passed by the Board of Councilmen July 1st, 1901.

Approved this 11th day of July, 1901.

W. A. JOHNSON, *Mayor.*

(This grant was sustained by the Court of Appeals of Kentucky, 137 Ky., 512.)

APPENDIX II.

CHARTER AND ORDINANCES OF THE COVINGTON STREET RAILWAY COMPANY.

NOTE: Appellee claims nothing under this charter and these ordinances. They are presented for the examination of court on the contention of the appellant, the City of Covington, denied by appellee, that the Abbott grant of Dec. 23, 1869, was limited to twenty-five years by the terms of the ordinance of December 15, 1864, *infra.*

CHARTER OF COVINGTON STREET RAILWAY COMPANY—FEBRUARY 9, 1864. (R., 37.)

An Act

To Incorporate the Covington Street Railway Company.

Be it Enacted by the General Assembly of the Comonwealth of Kentucky:

Section One. That N. C. Morse, Amos Shinkle, Jesse Wilcox, J. C. Sayres, John F. Fisk and M. M. Benton

and their associates, be, and are hereby created a body politic and corporate, under the name of The Covington Street Railway Company, with perpetual succession, and by that name may contract and be contracted with, sue and be sued in all courts, and shall have a capital stock of $250,000.00, divided into shares of one hundred dollars each to be subscribed as hereinafter provided.

Section Two. The persons named in the first section of this act, or any three of them, shall be the commissioners to receive subscriptions to the stock of the company, and to superintend the first election of directors; and before receiving any subscription, they shall give two weeks' notice thereof in some newspaper, circulating in the city of Covington, of the time and place of opening the books. Five dollars per share shall be paid by the subscribers before the first election of directors, and when the election shall have taken place, said commissioners shall hand over to the directors all the papers and books in their hands belonging to the company, and also pay over the money received in subscription. That so soon as seventy-five thousand dollars shall have been subscribed if the books have been opened one week, the commissioners may hold said election, and no subscription shall be deemed valid until the advance payment shall have been made.

Section Three. There shall be elected five directors of said company, all of whom must be stockholders, and after the first election, they must have held the stock for at least three months previous to the election. The annual elections of the company shall be on the first Saturday in January in each year, unless a different time shall be fixed by the Board of Directors, and those in office shall hold over if an election should fail, until an election shall take place; at said election stockholders shall

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be allowed one vote on each share held three months, and upon which all calls shall have been paid: *Provided*, no stockholder shall have more than one hundred votes, nor shall any vote, while delinquent in the payment of calls on the stock.

Section Four. The directors shall elect one of their body president, who shall possess the usual duties of presidents of like corporations. The president and directors shall constitute one board for the transaction of business; may ordain and establish the necessary by-laws for the government of the company and its employees; appoint a secretary and treasurer who may also be of the board, and such other officers as they may deem proper, and take from them their requisite bonds for the performance of official duties. They shall require payments on the stock of not more than five per centum per month till the whole shall have been paid, and if any call shall not be paid for one month after the same shall be due, the delinquent shall pay one per centum per month interest thereafter until payment, and the company may proceed to collect the said call by suit, or may forfeit the stock; in which case the payments that have been made shall enure to the benefit of the company. At least thirty days' notice shall be given before any forfeiture shall be declared, either in newspaper as before mentioned, or by personal service.

Section Five. The business of this corporation shall be to construct and use railways along the streets of Covington, and in the suburbs of said city. It may construct the lines along said streets, either with single or double track as they may consider beneficial to the interest of the company, and to which the City Council of said city may consent, authority for which is hereby given to said Council to make an agreement therefor;

and out of said city into the surrounding country, and along such turnpike roads as may be agreed with the turnpike companies. It may also construct tracks across the Covington and Cincinnati Bridge, by the consent and agreement of said companies, and may make connections with such other street railway as may be deemed advantageous and proper, and may have branches and district lines, and may construct and purchase cars and other equipments for said roads.

Section Six. That when said company shall have constructed a line upon any of the streets of said city, the city authorities shall not grant a right to any other company so long as this company shall use the same and comply with the terms and conditions of the grant. The Board of Directors may re-open the books of subscriptions to capital stock of the company and prescribe the terms of payment, and if necessary the capital stock may be increased by the stockholders at any regular or called meeting for that purpose, and in either case due notice shall be given to the stockholders, that such proposition will be made. Said board shall also determine the rates to be charged upon said roads.

Section Seven. The said corporation may borrow money upon the credit thereof to an amount not exceeding its capital stock at a rate not greater than ten per centum per annum, and may execute bonds therefor of not less denomination than one hundred dollars, and to secure the payment thereof by any pledge or mortgage of the property and income of the company.

Section Eight. That the company may purchase and hold such real and personal estate as may be considered necessary in the transaction of its business, and sell and convey the same whenever its interests may so require.

Section Nine. That any person who shall willfully place any obstruction by stones, logs, sticks, or other thing on the track of said company, or shall tear up or remove any part or portion of the track or the works thereof with the intent to obstruct the cars in passing thereon, or to throw them off the track, or shall burn or destroy any building belonging to said company, he shall be confined in the penitentiary not less than one or more than five years. That for the injury or destruction of any of the property of said company the person or persons found guilty thereof shall be deemed guilty of a misdemeanor and subject to a fine of not less than fifty or more than five hundred dollars, or imprisonment in the county jail not to exceed six months, or both.

Section Ten. In no case shall this corporation exercise any banking privileges.

Section Eleven. The General Assembly reserves the right to change, amend or repeal this act.

Section Twelve. This act shall take effect from its passage.

Approved February 9th, 1864.

Council Proceedings Leading up to Ordinance of December 15, 1864, and the Contract With the Covington Street Railway Company.

(R. 39 *et seq.*)

Book F Council Proceedings, page 587.

Meeting November 10, 1864.

Same (Shinkle) presented a petition from the incorporators of a street railroad with the charter and route of said road. Referred to a select committee consisting of Messrs. Shinkle, Shutt, Arnold, Bard and Condell, to report at next meeting of the board.

(See R. 39-42 for application and routes.)

Book F. page 592. December 1st, 1864.

Same (Shinkle) presented a report on the petition of the incorporators of a street railroad. On motion of Mr. Rose it was resolved that when the Council adjourn, it adjourn until next Monday night at seven o'clock to consider the above report.

Book F, page 593. December 5th, 1864.

Mr. Shinkle from special committee to whom was referred the charter and petition of the incorporators of a street railroad company reported in favor of granting the prayer of the petitioners with the exception of that portion of Madison Street route running from Madison on Pike to Washington Streets. As a substitute the committee recommended that the petitioners be granted the right-of-way over Sixth Street from Madison to Washington Street, then on Washington to Pike Street, to the line first designated. On motion the report was concurred in and the Committee on Law in conjunction with the City Attorney was instructed to report an ordinance granting the Street Railway Company the franchise asked for in their petition agreeable to the report of the Committee.

Book F, page 598. December 15, 1864.

Mr. Condell, chairman on Committee of Law, to whom was referred the report (petition) on the Street Railroad with instructions to report an ordinance, reported an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington, which had its first reading, when on motion the Council resolved itself into a Committee of the Whole,

Mr. Shutt in the Chair, for the purpose of considering the above ordinance. The Committee arose and through their chairman reported that they had examined the ordinance carefully and adopted it section by section and asked for your concurrence and adoption. On motion the report of the committee was received and adopted and the ordinance was read the third time and adopted unanimously, as follows:

"An Ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington.

SECTION 1ST. Be it ordained by the City Council of Covington that any company organized for the purpose of laying down rails for running street passenger cars to be drawn by horses, or mules, through the streets of Covington, shall be guided, governed and regulated by the following conditions and such restrictions as council may hereafter pass.

SECTION 2ND. No company shall be permitted to lay down a track through any of the streets of said city without first obtaining the consent of the City Council, designate the company to whom the privilege is granted, and the streets through which said line shall pass.

SECTION 3RD. All tracks laid shall be of the gauge of five feet and two inches, and of the most approved rail, which shall be not less than four inches tram, and not more than three-quarter inches flange, the same to be laid according to the direction of the City Council, and in such manner as to be no impediment to the ordinary travel, and use of the streets, with suitable bridges at all the gutters, so as to permit the flow of water under the same, and such grades as are or may be hereafter established by the City Council. Any company to whom any privilege may be granted, shall first enter into a good and

sufficient bond in the penal sum of fifty thousand ($50,000.00) dollars with the city, said bond to be drawn by the city attorney and to be endorsed by not less than five responsible freeholders and residents of the city as sureties to keep the streets between the rails in as good repair as the balance of the street, to the satisfaction of the City Council, and also that no motive power, except horses and mules, shall be used upon any street, and if any company or individual to whom any privilege shall be granted, shall fail to keep that portion of the street occupied by their track in good and sufficient repair, or shall refuse to pay into the city treasury the amount of tax or license fixed by council for the privilege of using, as required by this section, the City Council shall have the right to prevent the use of said street or streets by removing the rails therefrom.

SECTION 4TH. And upon the further condition that any company or individual to whom any privilege may be granted shall place and continue upon said streets good cars, with all the modern improvements for comfort and convenience to passengers, and that they run cars thereon as often as the public convenience may require.

SECTION 5TH. And provided any such company or individual shall not charge more than five (5) cents for each passenger on each route.

SECTION 6TH. And provided that no company or individual, to whom any privilege may be granted, shall assign or transfer their franchise in said road or roads, without first obtaining the consent of the City Council thereto.

SECTION 7TH. And provided further, that the City of Covington shall not be held liable to any company or individual for the breakage of any sewer, gas or water pipe, or from any delay in the transportation of passen-

gers, that may be caused by the making of sewers or culverts, or laying of water or gas pipes or the necessary repairing of same or from any other delay or damage that may be caused by fire or otherwise. But any such company or individual shall be liable for any loss or injury that any person may sustain, by reason of any carelessness, neglect or misconduct of their agents or servants in the management, construction or use of said track or street, and an such company or individual shall indemnify and hold the city harmless from any damage that may be claimed by property holders or by any person, or persons, on account of laying said track, or in the use, or by reason thereof, or by running the cars thereon.

SECTION 8TH. Provided any company or individual to whom privilege may be granted, as aforesaid, shall within fifteen days after the award granting such privilege, come forward and sign the proper contract agreeing to abide by these stipulations, and agreeing further to complete, and put in operation, and have cars running thereon, not less than two and a half miles of road, within twenty-four months after signing the necessary obligations, contract and stiplations as required by this ordinance.

SECTION 9TH. And be it further ordained, that the following specifications regulating the running of street railroads in Covington, be required of any company or individual, taking out license under the provisions of this ordinance, viz:

1. No cars shall be drawn at a greater speed than six (6) miles an hour.

2. While the cars are turning the corners from one street to another, the horses or mules shall not be driven faster than a walk.

3. No cars shall be allowed to stop on a crosswalk, nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the streets.

4. When the conductor of any car is required to stop at the intersection of streets, to receive or leave passengers, the car shall be stopped so as to leave the rear platform slightly over the crossing.

5. The conductors and drivers of each car shall keep a vigilant watch for all teams, carriages, persons on foot and especially children, either on the track or moving toward it, and on the first appearance of danger to such teams or persons, or other obstruction, the car shall be stopped in the shortest time and space possible.

6. The conductor shall not allow ladies and children to enter or leave the car while in motion.

7. Conductors shall announce to the passengers the names of the streets as the cars pass.

8. The cars after sunset shall be provided with signal lights.

9. The cars shall be entitled to the track, and any vehicle upon the track of said company shall turn out when any cars come up, so as to leave the track unobstructed, when requested by the driver of any car.

10. Provided that if any person or persons shall have cause to remove any iron safe or other large and heavy substance, they shall be allowed sufficient time to load and unload the same, without being liable or amenable for such obstruction.

SECTION 10TH. Be it further ordained, the franchise for street railroads as provided for in this ordinance and according to the plan of roads, as laid down in the schedule of the incorporators of The Covington Street Railroad Company, presented to this board with their petition now on file in the city clerk's office, be granted to

any responsible company, who will pay into the city treasury of Covington, the largest bonus for the same, and to the incorporators any expense they may have incurred in making a survey of the routes above referred to, together with the maps and estimates, not exceeding $100.

SECTION 11TH. Be it further ordained, that the city clerk be instructed to advertise in the Cincinnati Gazette, Commercial and Times, and one paper in Pittsburgh and in Philadelphia, until February 1st, that sealed proposals will be received up to the first of February next for the franchise above named, and that the same will be awarded to the highest and best bidder, at the first meeting of council thereafter.

It being understood that the present incorporators propose to transfer their rights and privileges, in and to the charter obtained by them for a street railroad in this city to the company or individual offering the largest bonus for the above mentioned franchise.

SECTION 12TH. Be it further ordained that the company to whom this franchise is granted, may have the privilege of repairing the streets between the rails by bouldering when they may wish to do so.

SECTION 13TH. This ordinance shall continue and be in force from and after its passage. All contracts made under the provisions of this ordinance, shall be for the term and period of twenty-five years.

Passsed by the following vote. (Unanimous.)

On motion the Clerk was instructed to advertise the above ordinance in the Volksblatt, Times and Saturday Evening American.

ADVERTISEMENT CINCINNATI DAILY TIMES JANUARY 4, 1865. (R., 36.)

"To Capitalists.

The Legislature of Kentucky having incorporated the Covington Street Railway Company, the city Council of Covington, Ky., on the 15th day of December, 1864, passed an ordinance prescribing the terms upon which the City will grant the right of way and upon what streets the road may run, and offered the franchise to any responsible company who will pay into the City Treasury of Covington the largest bonus for the same, and to the incorporators any expense they may have incurred in making a survey of the routes above referred to together with the maps and estimates not exceeding $100.

Sealed proposals will be received at the City Clerk's Office up to February 1st, 1865. The ordinance above mentioned can be had at this office.

H. E. WILSON,
City Clerk of Covington.

Covington, Ky., December 29, 1864.
(Inserted from December 29 to February 1st.)

ACCEPTANCE OF BID, FEBRUARY 23, 1865. (R., 48.)

Book F, p. 615. Council Meeting, February 23, 1865.

Same (Mr. Arnold) presented the proposals for constructing and running a street railroad in the city, which were opened and read, and on motion the bid of Thos. Sherlock and Malcolm McDonald and their associates was accepted by the following vote: Yeas—Mr. Shutt, Assmann, Arnold, Andrew, Bowen, Fallis, Karper, Hove-

kamp, Knoll, Maurer, Shinkle, Taylor, Reed. No. They proposing to pay into the City Treasury the sum of $250 per year as a bonus, also proposing to pay the expenses incurred by the incorporators of said company, in making a survey, etc., not exceeding One Hundred Dollars. The Committee on Law in conjunction with the city attorney was instructed to take bonds for the performance of the contract.

COUNCIL PROCEEDINGS RELATIVE TO AMENDMENT OF ORDINANCE AND AMENDMENT, AUGUST 3, 1865. (R., 49.)

Book F, page 666. July 27th, 1865.

Same (Bowen) presented a memorial from Thomas Sherlock and others, the Covington Street Railway Company, asking Council to pass a resolution or ordinance to be inserted and made part of the contract for the safety of both parties in the construction of the street railway. Referred to the Committee on Law in conjunction with the City Attorney to report an ordinance at their discretion.

Book F, page 673. AUGUST 3d, 1865.

Mr. Bowen reported the following ordinance which was read and the yeas and nays being called was passed as follows:

An Ordinance to Amend an Ordinance approved December 15th, 1864, entitled An Ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington.

Section 1. Be it Ordained by the City Council of Covington that the ordinance be amended as follows: The license fee for each car shall be the highest price now fixed,

or that the City Council from time to time may fix, not exceeding ten dollars, to be paid for license for a hack, omnibus, or other vehicle of like capacity as a car.

Section 2. At the expiration of the period of twenty-five years the City Council shall again offer the same routes, or these routes with other bounds added to any or all of them, to the highest and best bidder, and if any person or persons, or company or incorporation shall make a better bid than the present Covington Street Railway Company, such bid shall be accepted, only upon the condition that the successful bidders will take from the then owners of the roads, in Covington, and pay said owners, or arrange to pay them, therefor, to the satisfaction of said owners, all the property of every kind belonging to said owners, upon and pertaining to the then existing routes; providing the owners thereof can and will deliver the same free from incumbrance, at a valuation to be fixed by three disinterested and sworn parties, or by a majority of them, to be selected, one by the City Council of Covington, one by the owners, and one by the bidder; but should said bidder or said owners, or both, fail or refuse, within ten days after the acceptance of the bid, to select a valuer, then the City Council shall select the omitted valuer or valuers: and should said bidder fail or refuse to take and pay for said property, or fail to arrange to pay for same, as aforesaid, within twenty days after the return of the valuation of the City Council, then the owners of the road shall be entitled to take the bid; provided the City Council shall have the right to reject all the bids and offer the routes again, but upon the principles above set forth.

Provided, also, that the present company shall be entitled to continue to run the road, upon the then existing conditions, until a new bid has been accepted.

Section 3. The contract between the city and the present company shall contain the above stipulation and conditions.

COUNCIL PROCEEDINGS ACCEPTING CONTRACT AND BOND NOVEMBER 30, 1865. (R., 51.)

Book F, page 711. November 30, 1865.

Same (Bowen) presented the following bond and contract of the Covington Street Railway Company which was received and accepted.

(Bond is dated August 16th, 1865.)

Same presented the agreement between Covington Street Railway Company and the City of Covington which was accepted and the following resolution adopted.

Resolved, that the President of the City Council be authorized to sign the contract with the Covington Street Railway Company and affix the seal of the city thereto and that the contract be accepted and spread upon the records of the city and the original be filed away.

AGREEMENT DATED AUGUST 15, 1865. (R., 51.)

Articles of Agreement made and entered into this 15th day of August, 1865, by and between the City of Covington and The Covington Street Railway Company.

WITNESSETH: That whereas, the city council of said city, by resolution passed on the 23d day of February, 1865, accepted the bid and proposals of Thomas Sherlock and Malcolm McDowell and their associates, for constructing and operating a street railroad in said city; and whereas, the said Sherlock and McDowell, and their

associates are the owners of the stock and franchises of the said Covington Street Railway Company, and have assigned and transferred their rights and interests under said accepted proposal to said company; and therefore, in consideration of the premises, the said city of Covington doth hereby grant to the said Covington Street Railway Company permission to construct and operate railways upon the terms and conditions contained in an ordinance of said city council, passed on the 15th day of December, 1864, entitled 'An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington,' and amendment thereto, dated August 3, 1865, and the provisions of the charter of said city, and the charter of said railway company; and in pursuance thereof on the following streets of said city, or upon such of said streets, alleys or public grounds as the city may have control of, or condemned for public uses, as the city council, with consent of said company, may designate. It is understood that the city does not grant the absolute right of way on Madison street, from Twelfth to the corporation line, but she does grant the right to use the same as far as she has control over it.

The turn-outs may be changed from one street to another, and to different points on the same street, by and with the consent of both parties, hereto first had and obtained.

The routes at present designated, as follows:

GREENUP STREET ROUTE, OR No. 1.

Commencing corner of Scott and Front, running south to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over the

same route to Third street; continuing north on Greenup to Second, west on Second to Scott, to same place of starting; to be a single track route, with turn-outs at following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

Madison Street Route, or No. 2.

Commencing corner Scott and Front, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third; turn-outs at the following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth streets.

Pike and Banklick Street Route, or No. 3.

Running over the Madison street route to Sixth street, west on Sixth to Washington, south on Washington to Pike, west on Pike to Banklick, south on Banklick to Fifteenth street, east on Fifteenth street to Madison, a double track on Pike from Banklick to Washington, on Washington to Sixth and on Sixth to Madison, and turn-outs at the following intersections of streets with Banklick: Eleventh, Thirteenth and Fifteenth streets.

Main Street Route, or No. 4.

Running over that portion of the Madison street route from the corner of Front and Scott to Third and Madison, west on Third to Main, south on Main to Pike, west

on Pike to York, a single track with turn-outs at the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York; returning over the same route.

THIRD STREET ROUTE, OR NO. 5.

Running over the Main street route to Main, west on Third to Bullock, south on Bullock to Second, returning over the same route, single track, with turn-outs at the intersections of the following streets with Third: Philadelphia and Bullock.

And the said Covington Street Railway Company, for the privilege herein granted, agrees and binds itself to pay at the end of each and every year, during a period of twenty-five years, the sum of two hundred and fifty dollars; and to perform all the provisions, requirements and conditions of said ordinance, and amendments and the charter of said city, and such other orders and ordinances as the general welfare and experience may seem to require, and as may be adopted and ordained by the city council in reference to said railway company, and binding upon its part to be performed or upon the operator of said railway and the lessees of the above mentioned routes under said ordinance and amendment and others that may hereafter be ordained. All the provisions of said ordinance and said amendment are hereby by reference made part thereof as fully and with the same binding force as if the same were inserted herein at length.

The said company shall keep in repair all the crossings and intersections used by them; and it is further stipu-

lated that said company shall build and put into complete operation two miles of said road within thirty months from and after the 9th day of March, 1865, and that said company shall construct its road with rails having a tram of not less than four inches in width and a flange of not more than three-fourths of an inch in height, and a gauge of what is known as five feet two inches. This contract shall continue in force for a period of twenty-five years from its date.

This contract shall take effect and be in force and binding upon the parties hereto on and after the 9th day of March, 1865.

In Witness Whereof, The said city of Covington, by its president, under the seal of said city, has affixed its signature, and the said Covington Street Railway Company has caused its corporate seal to be affixed hereto and attested by its president and secretary the day and year first above written.

MAPS

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LARGE

FOR

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Office Supreme Court, U. S.
FILED
MAR 19 1918
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 225.

THE CITY OF COVINGTON, APPELLANT,

vs.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., APPELLEE.

REJOINDER OF APPELLEE TO APPELLANT'S REPLY BRIEF.

In his reply brief the City Solicitor has cited several additional cases upon which we desire to make comment.

In Davis *vs.* The Mayor, &c., of N. Y., 14 N. Y., 506 (1856), the Court of Appeals held that the Common Council of New York City, which had power to "regulate" its streets, did not thereby have the power to authorize the construction and operation of a street railway on Broadway; this was based on the view that such operation was not a proper street use. The court expressly stated, however, that such view was not entertained by the Court of Appeals of Kentucky. The court said (page 518), referring to several cases:

"In none of these adjudications, with the exception of the one in the Court of Appeals of Kentucky, has the position which I am opposing been affirmed in a case requiring its determination, etc." * * * "It has been laid down in the case in Kentucky * * * that the laying a railroad on a street or highway is only a new and improved method of making use of the public easement over the lands dedicated or appropriated, pursuant to law, for a street or highway."

The Kentucky case referred to is Lexington & Ohio R. R. *vs.* Applegate, 8 Dana, 289 (1839), where the Court of Appeals held that the Mayor and Council of Louisville, which had title to and control of its streets, had the power to grant the railway the right to operate on Main street.

Counsel seeks to distinguish this case as follows: "We conclude that the court based its opinion not on the general powers of the city under its charter, but on the authority conferred on such city by the special act of the legislature incorporating the railroad company."

We do not find any basis in the opinion for such a distinction. The report does not show, and we do not find, any such special authority in the act of incorporation. The court's reference to the city's title to its streets, and the extensive discussion of what is a proper street use, preclude the idea that the decision was based on any express legislative authority.

Wolfe *vs.* Lexington & Covington R. R. Co., 15 B. Monroe, 404 (1854), referred to in our main brief (page 14), cited the Applegate case with approval, and refers to the grant in that case as having rested for its authority on the municipal action. So in the Wolfe case itself, it does not appear that the charter of the railway or any other legislation gave Covington express power to make the grant which was upheld.

Milhau *vs.* Sharp, 27 N. Y., 611 (1863), follows Davis *vs.* The Mayor, etc., 14 N. Y., 506, which, as we have seen, was confessedly contrary to the Kentucky doctrine.

In Cumberland Telephone and Telegraph Co. *vs.* Avritt, 120 Ky., 35, cited by this court in the Owensboro case (230 U. S., on page 68), the court referred to its long line of decisions holding that the operation of a steam or street railway is a proper street use, and applying them to the telephone question there involved, said:

"We are unable to distinguish a telephone line from a steam railway or an electric railway on the public highway."

This case was cited by the Kentucky Court of Appeals in Jackson, etc., Telephone Co. *vs.* Hazard, 143 Ky., 149, 150, as authority for the proposition that control of the highway gave the fiscal court power to grant a telephone franchise thereon, even though it resulted in some obstruction of the highway (230 U. S., page 67).

Peoples' Railroad *vs.* Memphis Railroad, 10 Wall., 38 (1869), followed Davis *vs.* The Mayor, 14 N. Y., 514 (*supra*), and so far, at least, as Kentucky is concerned, must be regarded as having been superseded by the Owensboro case (230 U. S., 67 *et seq.*).

All of this question about the original powers of the city of Covington to make any grant seems to us to be immaterial in view of the city's repeated recognition of the Abbott grant in the hands of the successive corporations which owned it, and to whom the city had express power to make or confirm the grant; also in view of the fact that the city has never before, not even in its answer in this case, denied its power to make the Abbott grant.

All of which is respectfully submitted.

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